S. HRG. 98-962

GENOCIDE CONVENTION

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

EXECUTIVE O, 81ST CONGRESS, 1ST SESSION, THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

SEPTEMBER 12, 1984

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GENOCIDE CONVENTION

WEDNESDAY, SEPTEMBER 12, 1984

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 9:35 a.m., in room SD-419, Dirksen Senate Office Building, the Honorable Charles H. Percy (chairman of the committee) presiding.

Present: Senators Percy, Helms, Pressler, Pell, Biden, Tsongas, and Dodd.

The CHAIRMAN. I regret a 5-minute delay, but the Illinois delegation is meeting with the Commercial Club of Chicago on the future job outlook of the Midwest. Five minutes extra for that project I think was worthy.

Without objection, I will ask that the chairman's opening statements and Senator Pell's opening statements appear in the record in that sequence, but we will yield to Senator Helms and his statement will follow Senator Pell's. There is a meeting that he is chairing at this very moment, so we will have him read his statement first then.

Senator HELMS. Mr. Chairman, thank you so much for your accommodation. I do have a meeting of the Senate Agriculture Committee at 10 o'clock, which I must chair.

Mr. Chairman, I share President Reagan's belief that it is time to consider the Genocide Convention. As he said recently before the Convention of B'nai B'rith—and I quote him—"With a cautious view, in part due to the human rights abuses performed by some nations that have already ratified the documents, our adminstration has conducted a long and exhaustive study of the Convention. And yesterday, as a result of that review, we announced that we will vigorously support, consistent with the U.S. Constitution, the ratification of the Genocide Convention."

That's the end of the President's quote.

Mr. Chairman, I too support the ratification of the convention consistent with the U.S. Constitution, to quote President Reagan's phrase. There have been some doubts raised about the convention's consistency with the Constitution, but I think that those doubts can be resolved if the proper understandings are laid down at the time of ratification.

Now, the Holocaust of the Jewish people first crystallized world opinion against the horror of genocide. The world owes a special debt of gratitude to all Jews, not only in recognition of the special horror which touched in some way almost every Jewish family, but

also because they made the world focus on genocide, as such, as a crime.

It was in great part the result of this consciousness-raising that we began to perceive the crimes against the Armenians and the Ukranians and others. Yet, this treaty has not been approved by the Senate in the past 35 years, and the question is why.

It certainly has nothing to do with sympathy for the crime of genocide or for a reluctance to honor the victims of that crime. The problem is that the issue presents two important competing concerns: our revulsion over the crime of genocide and our obligation to protect the sovereign independence of the U.S. Constitution.

It is time to resolve but not compromise, Mr. Chairman, these legitimate questions about the constitutional impact of the treaty, and I know that this committee and the full Senate will examine this aspect carefully.

Mr. Chairman, one of the most eloquent statements on the constitutional impact of the Genocide Convention was made in 1970 before this committee by our distinguished former colleague, Senator Sam J. Ervin, Jr. I spoke last night for 45 minutes with Senator Ervin in connection with this convention, and I reflected then and I reflect now, Mr. Chairman, that I shall always be grateful to Senator Sam, my senior colleague from North Carolina for 2 years. I don't think I am exaggerating when I say that his statement on the Genocide Convention was one of the most brilliant highlights of his career in the Senate.

In it he showed not only his customary erudition and depth of legal scholarship, but his far-sighted wisdom for the future of the country. I wish that Senator Ervin could have been with us this morning in person to bestow his wisdom upon us once again, but the shortness of time in scheduling the hearing date made that impossible.

However, I would beg the indulgence of the chairman and the committee to ask unanimous consent that Senator Ervin's 1970 testimony be made a part of the record of these hearings.

The CHAIRMAN. Without objection, it will be made a part of the record.

[The material referred to follows:]

GENOCIDE CONVENTION

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

EXECUTIVE O, 81ST CONGRESS, 1ST SESSION

THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

APRIL 24, 27, AND MAY 22, 1970

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GENOCIDE CONVENTION

FRIDAY, MAY 22, 1970

UNITED STATES SENATE,
SUBCOMMITTEE ON GENOCIDE CONVENTION
OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 2 p.m., in room S-116, the Capitol Building, Senator Frank Church (chairman of the subcommittee) presiding.

Present: Senator Church, Cooper, and Javits.

Senator COOPER. I will call the subcommittee to order now. I understand that the chairman, Senator Church, will be here in a short time. The witness today is Senator Ervin. The Senator would like for us to proceed.

STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator ERVIN. I am deeply grateful to have such a large turnout, because often committees only have one.

Senator JAVITS. Mr. Chairman, the chairman of the subcommittee is necessarily stationed on the Senate floor in connection with the Church-Cooper amendment and he asked us to proceed.

Senator ERVIN. Gentlemen, I welcome this opportunity to appear before the subcommittee and to urge the subcommittee to recommend to the full committee that the so-called Genocide Convention not be reported to the Senate for consideration.

Senator JAVITS. I didn't get that. Not be reported?

Senator ERVIN. Yes. It would be extremely unwise for the Senate of the United States to ratify the Genocide Convention. This is particularly true at a time when it is manifest that a substantial part of the American people wish to contract rather than expand their international obligations.

HISTORY OF THE GENOCIDE CONVENTION

During the 1940's activists connected with the United Nations engaged in a strenuous effort to establish by treaties laws to supersede domestic laws of nations throughout the earth. The Genocide Convention represent one of these efforts. It originated in a resolution of the United Nations condemning genocide as a crime whether "committed on religious, racial, political, or any other grounds." When reduced to its final form it excluded genocide committed on "political" grounds because some of the parties to it did not wish to surrender even nominally their right to exterminate political groups hostile to their rulers.

Under its provisions, individuals as well as persons exercising governmental power would be subject to trial and punishment for offenses which have always been regarded as matters falling within the domestic jurisdiction of the various nations.

The Genocide Convention was adopted by the General Assembly of the United Nations on December 10, 1948, and was submitted by President Harry S. Truman to the Senate for its consideration on June 16, 1949. The Senate Foreign Relations Committee appointed a subcommittee composed of very able Senators, who conducted hearings in January and February 1950, and reported to the full committee that the United States should not ratify the convention in any event unless the Senate adopted four substantial understandings and one substantial declaration. Since this report was made, the Senate Foreign Relations Committee and the Senate itself by inaction have refused to ratify this convention.

In contrast to the attitude represented by this inaction during the preceding 20 years, the Senate Foreign Relations Committee has apparently revived the question of ratification during the past few months, notwithstanding the fact that there has been no change of circumstances which would make what was unwise in 1950 wise in 1970.

The only arguments now advanced for ratification of this convention is that it would improve the image of the United States in the eyes of Russia and other totalitarian parties to the convention, which strange to say have repudiated by understanding and reservations many of the provisions of the convention.

For example, these nations refused to be bound by article IX which subjects their actions under it to the jurisdiction of the International Court of Justice. Some of the proponents of ratification by the Senate advance the rather strange argument that the United States can safey ratify the convention because there is no effective way to enforce its provisions against the United States if the United States refuses to abide by them. I cannot buy this argument because I think that any nation which makes a contract in the form of a treaty should accept its obligations even in the event such obligations prove to be contrary to its own interest. Otherwise, why make treaties.

Before discussing the obligations which the United States would assume as the result of Senate ratification of the Genocide Convention, I wish to call attention to its salient provisions.

PROVISIONS OF THE GENOCIDE CONVENTION

By the Genocide Convention or treaty the contracting parties affirm in article I "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Articles II and III of the Convention read:

ARTICLE II

In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the convention and to provide effective penalties "for persons guilty of genocide or of any of the other acts enumerated in Article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the nation in the territory in which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Article VII provides that the parties to the treaty pledge themselves in genocide cases to grant extradition in accordance with their laws and treaties. Article VIII provides that "any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

Article IX provides that "disputes between the Contracting Parties relating to the interpretaion, application, or fulfillment of the present convention * * * shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

This brings me to the considerations which ought to deter the Senate from ratifying the Genocide Convention. Time and space compel me to limit my statement to only the most substantial of them.

CONVENTION DISTORTS CONCEPT OF GENOCIDE

1. If the Senate should ratify the Genocide Convention, the United States would be obligated by it to prosecute and punish public officials and private citizens of our country for acts alien to the concept embodied in the term "genocide."

The definition of genocide appears in article II which states that the term "genocide" embraces five specified acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." The Convention definition of "genocide" is inconsistent with the real meaning of the term, which is "the systematic, planned annihilation of a racial, political, or cultural group." The word "annihilation" clearly contemplates the complete destruction or the complete wiping out of the designated group.

Yet, the convention definition covers the destruction either in whole or in part of members of a group embraced by it. This means that a public official or a private individual is to be subject to prosecution and punishment for genocide if he intentionally destroys a single member of one of the specified groups.

When it considered this convention in 1950, the subcommittee of the Senate Foreign Relations Committee took note of the fact that the convention distorts and perverts the entire concept embraced in the word "genocide," and for that reason stated that the Senate ought not to consider ratification of the convention unless it announced this understanding of its meaning:

*** * * that the United States Government understands and construes the crime of genocide, which it undertakes to punish in accordance with this convention, to mean the commission of any of the acts enumerated in article II of the convention, with the intent to destroy any entire national, ethnical, racial, or religious group within the territory of the United States, in such manner as to effect a substantial portion of the group concerned.**

This distortion and perversion of the plain concept embraced in the word "genocide" represents an effort on the part of the drafters of the convention to make punishable either in the courts of an adherent to the treaty or in an international tribunal to be established under the terms of the treaty, all of the acts enumerated in article II and III of the convention.

Since an intent to destroy a single person belonging to one of the four designated groups would subject an official or individual to punishment, the treaty would make virtually every person in any nation adhering to it a potential victim of "genocide" as the meaning of that term is distorted and perverted by the convention. This is true simply because virtually every person on earth belongs to one or more of the four groups designated.

This observation is made exceedingly plain by the fact that an ethnical group is a "social group within a cultural and social system that claims or is accorded special status on the basis of complex, often variable traits including religious, linguistic, ancestral, or physical characteristics."

DRASTIC IMPACT OF CONVENTION ON OUR SYSTEM OF GOVERNMENT

2. Article II, section 2 of the Constitution provides that "the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article VI of the Constitution provides that "the Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

If the Senate should ratify the Genocide Convention, these constitutional provisions would automatically make the convention the law of the land, put all of its self-executing provisions into immediate effect as such, and impose upon the United States the obligation to take whatever steps are necessary to make its non-self-executing provisions effective. This means that the provisions of the Genocide Convention would immediately supersede all State laws and practices inconsistent with them, and would nullify all provisions of all acts of Congress and prior treaties of the United States inconsistent with them.

While Congress could repeal provisions of the Genocide Convention by future legislation, the States would be bound by them as long as the convention remained in effect. Moreover, the Genocide Convention would immediately require and authorize the Congress to enact legislation implementing its provisions, even though such legislation were beyond the power of Congress in the absence of the convention, and even though such legislation would deprive the States of the power to prosecute and punish in their courts acts condemned by articles II and III of the convention.

POWER OF CONGRESS TO DEFINE FEDERAL CRIMES

Senator CHURCH. I would like to ask a question at this point.

Is it your position that, in the absence of a Genocide Convention, Congress would be without the power under the Constitution to outlaw genocide as a Federal crime if it chose to?

Senator ERVIN. Absolutely.

Senator CHURCH. Do you think that it would require the convention to give Congress the power to define "genocide" as a Federal crime?

Senator ERVIN. Yes, undoubtedly; because Congress has no power generally to punish homicide as a Federal crime.

Senator CHURCH. Thank you.

Senator JAVITS. Could I ask one other question? Does the Senator contend, therefore, the convention could convey upon the Congress a power which it does not have under the Constitution of the United States?

Senator ERVIN. Yes; that is well established. It has been established in a multitude of decisions of the Supreme Court that a treaty, since it is the supreme law of the land, operates to override the powers reserved to the States by the fifth amendment.

Senator JAVITS. To draw that to its logical conclusion, the Senator concedes that a vote of two-thirds of the Senate concurred in by a President proposing the treaty can change the Constitution of the United States by giving a body organized under the Constitution other or additional power.

Senator ERVIN. No, I don't claim that it changes the Constitution of the United States because the Constitution of the United States says the treaty shall be the supreme law of the land; and by reason of that provision of the Constitution it takes precedence over any State law to the contrary and any prior act of the Congress to the contrary. That has been established by a multitude of cases.

Senator JAVITS. I know that. But we are talking now about constitutional authority. The Senator claims that even if such legislation were to go beyond the power of the Congress, as fixed by the Constitution, the Senator would have us believe that the treaty ratified by two-thirds of the Senate could extend Congress' power beyond the power it has under the Constitution.

Senator ERVIN. Yes; that is held in a multitude of cases. For example, under the Constitution of the United States the Congress has no power to legislate with respect to land titles within borders of the State. That is power reserved to the States by the 10th amendment.

It has been held in, I would surmise, 15 or 20 cases that a treaty of

the United States, where the United States enters in a treaty which gives people who are denied the right to own land by State law, that this treaty provision outlaws the State law. It was also held in the *Holland* v. *Missouri* case, that the Congress has no power under the Constitution to regulate hunting within the borders of the State. That was so held by the Supreme Court of the United States. Then Congress made a treaty with Canada under which the United States and Canada agree to protect migratory birds. Then Congress passed a law and held that the law of Congress outlawing the killing of these birds was binding, that since a treaty is the supreme law of the land that the treaty supersedes powers of the States. So there is no question about that.

CAN TREATIES ENLARGE THE POWERS OF THE FEDERAL GOVERNMENT?

Senator JAVITS. I don't find myself in agreement with the Senator on the concept that the Congress does not, under the Constitution, have authority to pass a law respecting genocide. It would have that authority by virtue of this treaty, and I know about the migratory bird case. It has been often argued as the Senator argues, but it has often been argued precisely the other way. It came up in respect of the Bricker amendment. The same argument was made and the Senate turned it down. I agree that a legal question like that, of a highly controversial kind brought up in this regard, brings us into a very complex legal argument; but I think we have to face it. I cannot accept the Senator's conclusion, and let it stand unchallenged, that the constitutional authority of the Congress is enlarged by a treaty.

As to a clear intent to supersede any inconsistent laws, that is another matter, because there is provision for it in the Constitution. But as to enlarging the powers of the Congress, I can't accept that.

Senator ERVIN. Well, I would say to the Senator from New York history shows that is the very reason a provision was made in the Constitution that treaties should be the supreme law of the land. That provision was placed in there as history shows because we had the treaty which ended the war of the revolution between the United States and England, and it secured certain prompted rights of people who had been loyal to the British Crown. The States ignored those things. For example, they had statutes confiscating property of people who were disloyal to the colonists and the State courts upheld the validity of these laws and then they wrote the Constitution to get around the same thing.

They also had a provision barring suits by laws of the States, and the State courts upheld the validity of these statutes of limitations which barred suits by British subjects and the State court denied their claims. And so that was one of the reasons they put this very provision in there.

So in some of the early cases, like a case that arose in the State of Virginia where the British property which had formerly belonged to the British subjects had been confiscated and sold to people who were loyal to Virginia, and claims that the British subjects had held against Virginians were held barred by State law by statute of limitations, and the Supreme Court of the United States held that the treaty with England had the effect of nullifying these laws with the State of Virginia, that British subjects could recover the land that they had

lost under these laws and they could bring suit on these claims notwithstanding the fact they were barred by the statute of limitations in the State of Virginia.

And if the distinguished Senator from New York will look at the annotations under the Constitution of the United States, annotations being made by Prof. Edwin S. Corwin, he will find a multitude of cases of this character.

Senator JAVITS. I don't think we should get in a legal argument here but I think the Congress does have the power to deal with offenses against the law of nations, article I, section 8, clause 10 of the Constitution; and, therefore, it could make genocide a crime. Therefore, this treaty does not and would not extend its constitutional power nor could it do so.

Senator COOPER. You are saying, first, that if we do not ratify this convention and the Congress attempted to enact legislation defining "genocide" in the terms that appear in the convention, that, in your view, the Congress would be acting beyond its authority.

Senator ERVIN. Yes.

Senator COOPER. The crime would be a State offense with State jurisdiction.

Senator ERVIN. Yes.

Senator COOPER. But then you are saying that if we ratify the convention, then the convention becomes the law of the land.

Senator ERVIN. Yes, sir.

Senator COOPER. And it would convey upon Congress Federal jurisdiction.

Senator ERVIN. That is right.

Surely, the Senate should pause and ponder what the impact of the ratification of the Genocide Convention would have on our system of government.

IMPACT ON CRIMINAL JURISDICTION

3. One of the most drastic impacts of the ratification of the Genocide Convention would have upon our system of government is in the criminal field. To make this transfer of jurisdiction workable, Congress would be required to enact new laws laying down rules of procedure to govern the trial of these newly created Federal and international crimes. Pending the passage of such laws, our country would experience utter confusion in the administration of criminal justice in respect to homicides, assaults and batteries, and kidnapings.

Proponents of ratification may argue that many homicides, assaults and batteries, and kidnapings would not fall within the definition of "genocide." This contention accentuates rather than minimizes the folly of ratifying the Genocide Convention.

As has been pointed out, virtually every person in America falls within one or more of the four groups designated in the Genocide Convention, and any offense denounced by the Genocide Convention against any one of them would ostensibly fall within the scope of the convention. The jurisdiction of the Federal courts under the Genocide Convention would not depend upon what the jury found in particular cases. It would depend upon the allegations made in the indictments or informations charging the offenses.

Consequently, we can reasonably expect that demands will be made that every homicide, every assault and battery inflicting serious injury, and every kidnaping shall be tried in a Federal court, or in an International Court to be established pursuant to the convention. What this will do to increase the congestion in the already overburdened Federal courts of our land beggars description.

In the absence of ratification of the convention, demands have already been made that the United Nations investigate the slaying of Black Panthers by police officers on the ground that their slaying constituted genocide under article II(a) and that the United Nations investigate the action of the legislature of one State in respect to welfare benefits on the ground that the legislative action constituted genocide under article II(c).

I respectfully suggest that the Senate should pause and ponder whether it is desirable to ratify a convention which would necessitate a fundamental alteration in the way in which criminal justice has been administered in the United States ever since our country came into existence as a free republic.

When the subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it clearly recognized that ratification of the convention would play havoc with our system of administering criminal justice in respect to domestic crimes made Federal and international crimes by articles II and III, and for this reason decided that the Senate should not ratify the convention in any event without making this declaration:

> In giving its advice and consent to the ratification of the Convention on the prevention and punishment of the crime of genocide, the Senate of the United States of America does so considering this to be an exercise of the authority of the Federal Government to define and punish offenses against the law of nations, expressly conferred by article I, section 8, clause 10 of the United States Constitution, and consequently the traditional jurisdiction of the several States of the Union with regard to crime is in no way abridged.

Confusion in the administration of criminal justice in respect to domestic crimes made Federal or international crimes by the Genocide Convention would not disappear with the enactment of legislation by Congress implementing the convention. The validity of this observation may be illustrated by taking a single crime, that of unlawful homicide. Under the Constitution of the United States, Congress does not have the power to make unlawful homicides generally Federal or international crimes. If ratified by the Senate, the Genocide Convention would give Congress this power in respect to homicides constituting genocide under the definition contained in the convention. Jurisdiction to prosecute and punish other unlawful homicides would remain in the State.

CONCURRENT OR EXCLUSIVE JURISDICTION

Senator CHURCH. May I ask at this point another question? If this were to happen and Congress were to pass implementing legislation defining the crime of genocide, would that preempt State jurisdiction? We have many cases where there is Federal jurisdiction and co-existent State jurisdiction in the State courts. In your judgment, would this be a situation where both would exercise concurrent jurisdiction, or would it be a situation in which the Federal jurisdiction would be exclusive?

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Senator ERVIN. I think the Federal jurisdiction would clearly be exclusive because the convention places upon Congress the duty to pass laws which will implement the treaty and provide for the punishment or suitable punishment for genocide.

Senator CHURCH. Could Congress confer the jurisdiction jointly to State courts as well as Federal courts?

Senator ERVIN. I do not believe it could, because Congress assumes the word state used in the genocide treaty refers to the United States, refers to nations, not States. The U.S. Congress, rather the United States under this genocide treaty would assume the duty as a nation to punish these offenses which are defined as genocide in this convention, and clearly it would be the duty of the United States to take over from the States under this the prosecution of these cases.

Senator COOPER. The convention would become the supreme law of the land.

Senator ERVIN. Yes, sir.

The only distinction between unlawful homicides remaining in the jurisdiction of the States and unlawful homicides transferred by the Genocide Convention and acts of Congress implementing it to the Federal Government would depend upon whether the homicide is committed with genocidal intent. As a consequence, every unlawful homicide would apparently be within the jurisdiction of both the Federal and the State Government insofar as the external circumstances of the slaying are concerned.

Hence, either State or Federal courts could assert jurisdiction in respect to virtually all homicides, and an acquittal of the charge in one court would not bar a second prosecution based on the same facts in the other court. This being true, a person could be twice placed in jeopardy for the same offense.

The power of a Federal court to try a person for a homicide on the ground that it constitutes genocide depends upon the allegations of the indictment and not upon the ultimate finding of the jury. On a trial in the Federal court, the jury would be compelled to acquit the accused of genocide unless it found that he acted with the requisite genocidal intent, no matter how atrocious the circumstances attending the homicide otherwise might be. In such a case, the accused would go unwhipped of justice unless he was placed upon trial in a State court.

The Senate should be slow to ratify any convention which would make such confusion in the administration of criminal justice in cases of this kind.

MEANING OF CONVENTION SHROUDED IN UNCERTAINTY

4. If the Senate should ratify the Genocide Convention, it would place obligations upon the United States to prosecute and punish as genocide acts whose nature the convention fails to dispose and to take steps whose nature the convention fails to reveal.

If the convention is ratified, article II(b) would impose upon the United States the duty to prevent and to prosecute and punish public officials and individuals who cause "mental harm to members" of any one of the four groups named in the convention. What mental harm means in this context is totally incomprehensible, and what psychological acts or omissions are made punishable in this context are

left in obscurity. When the subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it reached the conclusion that the Senate ought not to ratify the Genocide Convention in any event unless it expressed this understanding "that the U.S. Government understands and construes the words 'mental harm' appearing in article II of this convention to mean permanent physical injury to mental faculties."

Senator CHURCH. May I ask if you approved of the wording of that understanding?

Senator ERVIN. Yes, I think the United States would be very foolish to ratify it without putting in this understanding. In fact, I think the United States would be very foolish to ratify it even with this understanding.

If the convention is ratified, article II(c) would impose upon the United States the duty to prevent and to prosecute and punish anyone who deliberately inflicts "on the group conditions of life calculated to bring about its physical destruction in whole or in part." What this means, no mind can fathom. Does it mean that a State or county official who refuses to give to a member of one of the four groups designated in the convention the amount of welfare benefits deemed desirable is to be punished or prosecuted for genocide? Does it mean that the Court of International Justice shall have power under article IX to adjudge that Congress or a State legislature which does not make available to members of one of the four groups what the court deems to be adequate welfare benefits has violated the convention?

If the convention is ratified, article III(c) makes any official or individual in our land punishable for "direct and public incitement to commit genocide." What does this mean? Does it mean that the convention undertakes to make a Senator or a Congressman punishable for genocide if he makes a speech outside of the chamber of his respective House in which he justifies the action of Arabs in killing Jews, or the action of Jews in killing Arabs? Does it undertake to deprive public officials and citizens of America of the right to freedom of speech with respect to matters falling within the terms of the genocide convention?

TREATIES CANNOT TAKE AWAY RIGHTS GUARANTEED BY CONSTITUTION

Senator CHURCH. Could any provision in this convention, any convention, or treaty operate to deny a citizen of the United States rights guaranteed to him under the Constitution?

Senator ERVIN. I would give a negative answer to that question were it not for a case that originated in the city of Chicago. The case was *Terminiello* v. *Chicago*, 337 U.S. 1 and it dealt with an ordinance of the city which made it unlawful for any person to make speeches or issue any literature which made reflections upon any race of men. The defendants were convicted in the courts of Illinois under the ordinance and the case was heard by the U.S. Supreme Court. By a vote of 5 to 4 the Supreme Court declared the ordinance invalid; however, both the majority and the minority indicated that when such speeches present a clear and present danger to incite others, they are not protected by the first amendment. The four dissenting Justices pointed out many cases in this area.

Senator CHURCH. That seems a very strange decision.

Senator ERVIN. It is when you consider the language that might create a precedent declaring the present danger of riots.

Senator CHURCH. That really is not in response to my question. In the decision, you raise a question as to the decision of the court passing upon the first amendment. No treaty was involved in the Chicago case. It was a city ordinance. The question was whether or not the ordinance conflicted with the free speech guaranteed by the first amendment.

Senator ERVIN. That is right.

Senator CHURCH. My question was, no treaty, whether it is this treaty or any other treaty, or no statute of any kind, that undertakes to deny a citizen of the United States rights guaranteed under the Constitution, can do that unless the Supreme Court of the United States decides that the statute is constitutional? In other words, the Constitution stands above both treaties and statutes.

Senator ERVIN. Well, I would say if the Constitution is interpreted correctly that would be my interpretation. But the Supreme Court has indicated particular situations dealing with racial speeches which could be prohibited by an ordinance that denied people the right of freedom of speech. Of course, this is in a field that involves racial questions just like the genocide treaty involves racial questions. If the Court can envision such an ordinance dealing with racial questions, that is can uphold, then the Court can certainly uphold similar legislation enacted by Congress under treaty, or the treaty itself, which is the supreme law of the land.

Senator CHURCH. You are criticizing a decision the Court made rather than the principle that is involved, and the principle is that both treaties and statutes are subject to the Constitution.

Senator ERVIN. Yes. There is only one case that I know that lays down that thing, and I think is sound and that is in the *Reid* case. But there are some other strange decisions that hold under treaties we can provide for the trial of an American service man in a Japanese court where he is denied the right to be indicted by a grand jury, a trial by jury, and that is the *Girard* case which was handed down a few years ago. In other words, I think the Constitution itself says you can't take away a basic right, but the Supreme Court has held to the contrary.

"COMPLICITY IN GENOCIDE"

If the convention is ratified, public officials and private citizens in our land will be subject to punishment in Federal courts or possibly in international penal tribunals to be established under article VI if they are guilty of the undefined offense designate as "complicity in genocide." What is complicity in genocide? The convention does not say.

When the subcommittee of the Senate Foreign Relations Committee considered the convention in 1950, it recognized the vagueness and uncertainty of this proposed Federal and international crime, and recommended that the Senate should not ratify this convention in any event without stating the following reservation "that the U.S. Government understands and construes the words 'complicity in genocide' ap-

pearing in article II of this convention to mean participation before and after the fact and aiding and abetting in the commission of the crime of genocide."

If the convention is ratified, article II would impose upon the United States the obligation to prevent and to punish as a crime under international law any act of genocide "whether committed in time of peace or in time of war," and article VIII would permit any party to the convention to call on the United Nations to take such action against the United States under the charter of the United Nations it considers "appropriate for the prevention and suppression of acts of genocide, or any of the other acts enumerated in article III" occurring or likely to occur anywhere in the United States.

What actual obligation does article I impose upon the United States with respect to events occurring either in peace or in war in lands beyond the seas? Does it require the United States to go to war to prevent one nation from killing the nationals of another nation? The convention does not say, but article IX places the power to determine this question in the International Court of Justice.

Does article VIII imply that the United States agrees that the United Nations is to investigate or take action concerning the acts of public officials and individuals occurring within the borders of the United States? The convention does not say, but article IX leaves this determination to the International Court of Justice.

Able lawyers have expressed the fear that article VI imposes upon the Congress an implied commitment to support the creation of an international court for trials of American citizen for genocide. I find myself in complete harmony with their opposition to subjecting our citizens and other persons within our territorial jurisdiction to trial, conviction, and sentence for acts of genocide committed in the United States by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with domestic crime.

CONVENTION MAKES SOLDIERS PUNISHABLE FOR SERVING THEIR COUNTRY IN COMBAT

5. If the Senate should ratify the Genocide Convention. it would make American soldiers fighting under the flag of their country in foreign lands triable and punishable in foreign courts—even in courts in our warring enemy—for killing and seriously wounding members of the military forces of our warring enemy.

This is made indisputable by article I which-provides that genocide is punishable under the convention whether it is committed in time of peace or in time of war, and by the fact that it contains no provision exempting soldiers engaged in combat from the coverage of the provisions of the convention. When soldiers kill or seriously wound members of a detachment of the military forces of a hostile nation, they certainly do so with intent to destroy, in whole or in part, a national group as such. Hence, their acts in combat fall clearly within the purview of the convention. In such cases, they are triable and punishable under article VI in the courts of the nation in whose territory their acts are committed, or in such an international penal tribunal "as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

These things being true, American soldiers killing or seriously wounding North Vietnamese soldiers or members of the Vietcong, or South Vietnamese civilians in South Vietnam, are triable and punishable in courts sitting in South Vietnam, and American aviators who kill North Vietnamese soldiers or civilians in bombing raids upon targets in North Vietnam, and who fall into the hands of the North Vietnamese, are triable and punishable in the courts of North Vietnam. No sophistry can erase this obvious interpretation of the Genocide Convention.

CONVENTION SUBORDINATES THE AMERICAN GOVERNMENT TO THE WORLD COURT

6. If the Senate should ratify the Genocide Convention, article I would impose upon the President, as the Chief Executive of the United States, the duty to enforce both the provisions of the convention and any acts of Congress in implementing them as the supreme law of the land.

Article V would obligate the Congress to enact legislation to give effect to all the provisions of the convention, and to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III, and article VI would obligate the Supreme Court of the United States and all inferior Federal courts created by Congress to interpret and apply all of the provisions of the convention and of the acts of Congress implementing it to cases coming before them under the terms of the convention and the acts of Congress implementing such terms.

7. If the Senate should ratify the Genocide Convention, it would bring into play article IX which provides that disputes between the parties to the convention relating to the "interpretation, application, or fulfillment" of the convention "shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Under this article the International Court of Justice would be empowered to decree that the President of the United States, as chief executive officer of the United States, had interpreted and applied the provisions of the convention incorrectly and by so doing impose upon the President of the United States its notions as to how the convention should be interpreted and enforced; the power to adjudge that legislation enacted by Congress to give effect to the provisions of the convention was insufficient to fulfill the obligations imposed upon it by the convention; and the power to adjudge that the Supreme Court of the United States and Federal courts inferior to it had interpreted and applied the provisions of the convention incorrectly and by so doing require these tribunals to apply its notions as to how such provisions should be interpreted and applied to future cases coming before them.

When their attention is called to the drastic powers which the ratification of the Genocide Convention would bestow upon the International Court of Justice in respect to the President, the Congress, and the Supreme Court and other inferior Federal courts, the proponents of ratification assert that these agencies of the Government of the United States do not have to obey the rulings of the International Court of Justice if they deem that such rulings infringe upon the

fundamental sovereignty of the United States. In so doing they ignore the solemn obligation assumed by the United States under article 94 of the charter of the United Nations which reads as follows: "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

The Charter of the United Nations clearly contemplates that the United Nations will not interfere in the domestic affairs of any nation. The Genocide Convention goes a bow shot beyond the charter of the United Nations.

It undertakes to regulate certain domestic affairs of the parties to it by converting what have always been domestic crimes into international crimes, and confers upon the International Court of Justice the vast powers set forth in article IX.

Consequently, if the Senate should ratify it, the Genocide Convention would render the Connally Reservation, which was designed to prevent the International Court of Justice from exercising jurisdiction over any domestic affair of the United States, inapplicable to any of the matters covered by the convention, and would nullify the Vandenberg Reservation to the jurisdiction of the International Court of Justice which stipulates that American acceptance of compulsory jurisdiction of the Court shall not apply to "disputes arising under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court, or the United States specially agrees to jurisdiction."

CONCLUDING COMMENTS

What I have said does not militate against the good intentions of those who drafted the Genocide Convention, or those who favor its ratification. All of us are opposed to the systematic, planned annihilation of any national, ethnical, racial, or religious group. The existing laws of the United States and its several States are adequate to punish all of the physical acts of violence denounced by the Genocide Convention. Hence the Senate does not need to ratify the Genocide Convention in order to make these acts punishable as crimes if committed within the borders of our land.

But the Senate should not permit itself to be persuaded by the good intentions of the proponents of ratification to ratify a convention which would have such a tragic impact upon the system of government which has always existed in our land, and which for the first time in our history undertakes to make undefined psychological harms inflicted in some undefined manner Federal and international crimes.

The American Bar Association has twice urged the Senate to reject the Genocide Convention—once in 1949 and again in 1970.

In closing, I urge every member of the Senate to read the booklet entitled "the Convention on the Prevention and Punishment of the Crime of Genocide" prepared by 36 of the most distinguished and patriotic lawyers of America.

When this convention was originally submitted to the Senate for ratification or rejection, one of America's ablest jurists, Orie L. Phillips, Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, wrote an article entitled "The Genocide Convention: Its

Effect on our Legal System," which appeared in the American Bar Association Journal for August 1949. I attach a copy of this article to this statement and commend its reading to all of the Members of the Senate.

I would not in the interest of time read his article. I ask that it be printed in the record as a part of my statement.

(The statement follows:)

[From American Bar Association Journal, August 1949]

THE GENOCIDE CONVENTION: ITS EFFECT ON OUR LEGAL SYSTEM

(By Orie L. Phillips, Chief Judge, United States Court of Appeals for the Tenth Circuit)

In this article, Judge Phillips makes a concise, precise, analysis of the terms of the proposed Convention on the Prevention and Punishment of Genocide, and then discusses the effect of the Convention should it be consented to by the Senate. He points out that under the Constitution, a treaty is the supreme law of the land, superior to any state constitution or statute, and any existing federal statute, and that once a treaty has been approved by the Senate no further action is necessary to make it part of the municipal law of every state, binding upon individuals. While recognizing our international responsibilities, Judge Phillips questions the wisdom of this Convention and offers a suggestion that will carry out our international obligations without subjecting individual Americans to trial and conviction by a court that may not operate under the safeguards to an accused accorded by our legal system.

On June 16, 1949, the President transmitted to the Senate the Convention on Genocide with the request that the Senate give is advice and consent to its ratification.

By this Treaty the contracting parties confirm that genocide is, "A crime under international law which they undertake to prevent and punish."

Articles II and III of the Convention read:

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties "for persons guilty of genocide or any of the other acts enumerated in Article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the state" in which the act was committed, or by "such international penal tribunal as may have jurisdiction with respect to such contracting parties which shall have accepted its jurisdiction."

Article IX provides that disputes between the contracting parties relating to the "interpretation, application or fulfillment of the present convention," shall be submitted to the International Court of Justice at the request of any party to the dispute.

Thus, it will be seen that it is proposed by the action of the President, consented to by two-thirds of the Senators present [1] when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their punishment and for the trial of persons accused thereof either in our domestic courts or in an international tribunal.

Treaty-making power is reviewed

It would seem appropriate, therefore, to review the treaty-making power.

Section 2 of Article II of the United States Constitution authorizes the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

The power is not one granted by the states. Neither did the powers of external sovereignty depend on the affirmative grants of the Constitution. If they had not been mentioned in the Constitution, they would have vested in the Federal Government as necessary concomitants of nationality. They embrace all the powers of government necessary to maintain an effective control of international relations.[2]

". . . the external powers of the United States are to be exercised without regard to state laws or policies." [3]

". . . the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceed imperatively to demand broad national authority.' " [4]

The treaty-making power is not limited by any express provision in the Constitution. But it does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our Government and the relation between the states and the United States.[5]

The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may be made which affect rights under the control of the states.[6]

Treaty is equivalent to statute

A treaty, entered into in accordance with constitutional requirements, to the extent that it is self-executing, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an Act of Congress. In addition to being an international contract, it becomes municipal law of the United States and of each of the states, and the judges of every state are bound thereby, anything in the constitution or laws of any state to the contrary nowithstanding.[7]

In the event of a conflict between a treaty made in accordance with constitutional requirements and the provisions of a state constitution or a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control.[8]

But, a treaty may be abrogated by the enactment of a subsequent federal statute which is clearly inconsistent therewith.[9]

Thus, it will be seen that it is proposed that we set out on a course, under a power without express limitation and of broad scope, to enact domestic criminal law, without any concurrence by the House of Representatives, the body traditionally regarded as closest to the people.

Moreover, if the offenses involved should be regarded as international in character by Section 8 of Article I of the United States Constitution, Congress has the power "to define and punish . . . offenses against the law of nations."

Convention would become supreme law of land

Since the Convention in most respects is self-executing, in those respects, on ratification, it would become the supreme law of the land. That would not be true as to any other contracting party except France and a few other states. Even if non-self-executing, the obligation to implement the Treaty by legislation is as binding as the Treaty itself.

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[1] See Art. II, § 2, United States Constitution.
[2] *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315–318.
[3] *United States* v. *Belmont*, 301 U.S. 324, 331.
[4] *United States* v. *Pink*, 315 U.S. 203, 232.
[5] *Asakura* v. *Seattle*, 265 U.S. 332, 341; *Holden* v. *Joy*, 84 U.S. 211, 243; *Geofroy* v. *Riggs*, 133 U.S. 258, 267.
[6] *Missouri* v. *Holland*, 252 U.S. 416, 432.
[7] See *Valentine* v. *Neidecker*, 299 U.S. 5, 10; *Whitney* v. *Robertson*, 124 U.S. 190, 194.
[8] *Santovincenzo* v. *Egan*, 284 U.S. 30, 40; *Nielsen* v. *Johnson*, 279 U.S. 47, 52.
[9] *Whitney* v. *Robertson*, 124 U.S. 190, 195; *Botiller* v. *Dominguez*, 130 U.S. 238, 247; 52 *Am. Jur. Treaties*, 818, § 21; Note, 134 *A.L.R.* 885.

It is one of our fundamental concepts that a legislative body, in the exercise of its power to declare what constitutes a crime, must define it so as to inform persons subject thereto, with reasonable precision, what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [10]

Do the definitions in Articles II and III of the Convention meet that test?

What is a part of a national, ethnical, racial or religious group—one member, two members, how many?

If an act was done with intent to destroy two members of a group, although actuated by no malice toward the group as such, would that be genocide?

Would it not be more accurate and desirable if the perequisite intent was defined as an act committed with intent to injure one of the enumerated groups as such, so as to make it clear the act must be directed toward the group as such and not merely at an individual member or members thereof?

What is meant by mental harm?

Does not complicity mean the act of an accessory, or to aid, abet, assist, or incite genocide?

A person accused of an offense defined by the Convention, if tried by an international penal tribunal, would not be surrounded by the safeguards we accord persons charged with domestic crimes.

Should we ratify convention with reservations?

In the event we ratify the Convention, should we, by reservation, expressly provide that citizens of the United States and persons within the territorial jurisdiction of the United States, charged with an offense defined in the Convention, will be subject to trial and sentence only by a competent judicial tribunal of, and sitting within, the United States, vested with jurisdiction over such offense by federal legislation; that a citizen or other person so charged shall be presumed to be innocent until his guilt has been established by lawful evidence beyond a reasonable doubt; that a citizen or other person so charged shall be protected by all the safeguards embraced within the Constitution of the United States, including the rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States, to an accused charged with a domestic crime; and that such citizen or other person shall not be subject to be charged, tried, or sentenced by any international penal tribunal? Of course, no international penal tribunal has yet been created, and the advice and consent of the Senate would be necessary to subject our citizens to the jurisdiction of such a tribunal should it be created. But should we not endeavor to close the door to the giving of that advice and consent in the future?

Although the United Nations Charter provides that nothing therein contained shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, since our representatives have participated in the drafting and approving of the Genocide Convention, if it should thereafter be ratified by the United States, would the matters embraced in such Convention be thereby withdrawn from our domestic jurisdiction?

Should we agree to submit to the International Court of Justice a dispute as to the interpretation, application, or fulfillment of the Convention by us? Suppose a citizen of the United States was charged with one of the offenses defined in the Convention—the group involved being an alien racial group—and tried in a competent tribunal in the United States, and our domestic courts, including the Supreme Court of the United States, should hold the act did not constitute an offense under the Convention. Could the state, of which the alien group were subjects, seek a review as to the interpretation of the treaty in the International Court of Justice? If it could not seek a direct review, could it seek an interpretation by the International Court which would be binding on our domestic courts in the future?

Should we obligate the United States to undertake to prevent and punish genocide in other states? Such seems to be the import of Article I of the Convention.

I assume that no one will deny that the acts defined in the Convention as offenses are abhorrent and the purpose to prevent them wholly commendable. The question is as to the method and means to attain that end.

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[10] *Connally* v. *General Const. Co.*, 269 U.S. 385, 391.

If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under Section 8, Clause 10, Article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our own domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus set our own house in order, would offer the same protection to the accused as one charged with any domestic crime, and would reserve to our own courts the final determination of questions as to the interpretation of the penal statute. To agree, by international convention, to so define, try, and punish persons who commit the offenses which the treaty undertakes to define, would seem to me to wholly fulfill our international obligation, and would avoid many serious questions with respect to the incipient effects of ratification of the Convention on our constitutional and legal system and questions of policy which will arise on a consideration of concurrence by the Senate in the proposed Convention.

Senator CHURCH. Thank you for your statement. I want to apologize for having been a little late, but I was held up on the floor.

Senator ERVIN. Those things are understandable to us because each of us has 10 times more things to do than we can get around to.

"IN WHOLE OR IN PART"

Senator COOPER. I think the Senator has always provided very helpful comments. I note that your definition of what the crime of genocide would be is, "the annihilation of a whole group."

Now, the convention itself, in article II, says "genocide means any of the following acts committed with intent to destroy in whole or in part."

How would you draw a distinction between destruction of a group "in whole or in part." How would we define it?

Senator ERVIN. That is why I think they have distorted the plain meaning of the concept of genocide. In other words, when you undertake to exterminate a group or destroy a group in whole or part, if you destroy one member of it you are destroying it in part. And that is one which makes it go far beyond what true genocide is. If you destroy one member of either one of these four designated groups, because he is a member of one of those four designated groups, you have destroyed the group in part.

Senator COOPER. The question would be determined upon the basis of the intent?

Senator ERVIN. Yes.

Senator COOPER. Or the ability to prove intent.

Senator ERVIN. Yes.

IMPLEMENTATION OF TREATY

Senator COOPER. Under this convention, if it should be ratified, Congress would have an obligation to enact legislation to make it effective, wouldn't it?

Senator ERVIN. Yes, the President assumes that obligation.

Senator COOPER. Now for article V. If the treaty should be ratified, it would be our duty to follow its provisions, not to evade them, is not that so?

Senator ERVIN. That is correct.

Senator COOPER. Article V provides that the contracting parties undertake to enact, in accordance with their respective constitutions,

the necessary legislation to give effect to the provision of the present convention.

What would occur if the Congress did not enact legislation?

Senator ERVIN. Any party to the treaty could go before the International Court of Justice and obtain a decision from that court that the United States had not performed its obligation under the treaty.

Senator COOPER. Article VI provides that "persons charged with genocide or any other acts enumerated in Article II shall be tried by a competent tribunal of the state in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

There is no such international tribunal. If an American national commits a crime of genocide, as is interpreted in the country where the act is committed, and the American returns to the United States before he is tried, would the United States be under the duty, under the treaty, to return our national to the country where the act was committed?

Senator ERVIN. Yes, because it assumes a duty under the treaty to enact such legislation or to take such action as will be necessary to carry out the terms of the treaty.

Senator COOPER. We had testimony from the State Department. It said in effect, as I understood it, that the Department would not be bound by Article VI, but that extradition would be determined by the terms of an extradition treaty.

Senator ERVIN. Well, Article VI provides that the parties to the treaty pledge themselves in genocide cases to grant extradition in accordance with their laws and treaties. That obligation would rest on the United States, if it had a treaty, for extradition to the particular country which was asking for the custody of these people. But if it didn't have a treaty, Article V would come into play.

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the convention and to provide—I can stop right there—"to give effect to the provisions of the convention."

One of the provisions of this convention is that a case is going to be tried, a case arising under the convention is going to be tried in the competent court of the territory of the country in whose territory the act was allegedly committed. The State Department to the contrary notwithstanding, I would say, if there is not an extradition treaty in existence that would require us to extradite, it would be the duty of the Congress to pass one for the particular instance because that would be necessary to give effect to the provisions of the convention to the effect that a person committing an act of genocide was to be tried in the court of the nation in whose territory the act of genocide occurred.

In other words, the State Department baffles me why it wants to get a treaty like this ratified and then tries to devise dubious ways to show that you don't have to do what it obligates us to do is something I can't comprehend.

Senator COOPER. One of the problems that concerns me in ratifying the treaty relates to the obligations we undertake in carrying it out. But the arguments we heard concerned methods for evading it.

Senator ERVIN. The convention clearly provides in Article VIII that

if you have an extradition treaty it will be carried out, and it provides in Article V if you don't have such a treaty we will enact laws to that effect.

OBLIGATION TO EXTRADITE

Senator CHURCH. As I recall, both the State Department witnesses and the Justice Department witnesses were in agreement that our obligation to extradite under the treaty is limited by the treaty's terms only to those countries with which we have established extradition treaties.

Senator ERVIN. That is true about the immediate extradition. But under Article V we have contracted to enact the necessary legislation to give effect to the provisions of the convention, and the convention provides that a man is to be tried in the court of the nation in whose territory the alleged act of genocide occurred. So if we don't have a treaty now we are obligated to pass a law to provide for delivering him over to that nation. And neither the State Department with assistance of the Department of Justice can erase that provision in the treaty or destroy its plain meaning.

Senator COOPER. It was suggested by the Department of Justice and the State Department that before an American national could be returned to the state for trial where the alleged offense was committed, that first, as Senator Church said, we must have an extradition treaty with that state, that it must provide that the accused receive the type of due process in the trial in that state as in the United States. Also there would be recourse to habeas corpus in this country for determination whether or not there was probable cause that the crime had been committed.

Senator ERVIN. There is not a syllable in the convention that guarantees any American who may be tried in a court of a foreign nation for genocide that he will have any of the safeguards that surround him here. Not a word.

Senator COOPER. Do you think the American national whose extradition was requested by another country could have available to him a writ of habeas corpus.

Senator ERVIN. I do not. I do not. Because it would be denied on the ground here the supreme law of the land provides for trial in courts of a foreign country.

Senator CHURCH. Is it not true, Senator, that we presently have extradition treaties with a number of countries? We have promised or assumed the obligations to extradite an American citizen, for instance, for the crime of murder if it were committed in London. We do have treaties by which the American citizen, in conformity with the treaty, would be turned over to the English authorities for trial.

Senator ERVIN. That is right.

Senator CHURCH. This, then, doesn't establish a new precedent in that regard?

Senator ERVIN. Oh, no, except it puts an obligation on us to provide either by treaty or law for the extradition of people to countries for trial in the courts of a country for genocide where we have no treaty and have no law that would require it or permit it at this time. You can't try a man in a court of a foreign nation without his being there and we say we will do everything necessary to carry out this treaty.

So that makes it very clear to me we are obligated to make treaties or enact statutes that accomplish that purpose in cases where we now have no extradition treaties.

Senator COOPER. In what respect would the procedure be different if Congress should enact legislation defining genocide, and a case arose where another state requested extradition of a U.S. national for that crime, and our national went into court for a writ of habeas corpus. Would we still have that same remedy available to an individual to have a determination made by a court of this country whether or not there is a prima facie case before the writ would be honored in cases of extradition?

Senator ERVIN. I believe most extradition treaties provide the only question that can be litigated is the question of whether a man is a fugitive from justice. You might raise it on that question if there is not some prima facie case that doesn't exist that he is not a fugitive from justice. But this treaty does obligate and provides the man is going to be tried in the courts of the nation in whose territory the crime was committed, that we are going to do everything to effect the treaty, and naturally we would have to honor requests for extradition. And if we didn't have a treaty that covers extradition in that country we would have to make a treaty or pass a law.

INTERPRETATION OF TREATY OBLIGATION

Senator COOPER. The argument was made that this provision requiring trial in the state where the crime is committed was not expected to be observed in every case because in the debates in the U.N., as I recall, exceptions were provided for. Would the debate have any effect upon the convention?

Senator ERVIN. I wouldn't think so because here is the trouble. We can't interpret this treaty ourselves, give the firm interpretation to it. The Supreme Court of the United States can't do it. The President or the Congress can't do it. Because the power is given especially to the International Court of Justice, and whatever they say we have to follow.

Senator COOPER. The International Court of Justice cannot enforce it.

Senator ERVIN. No, but it can make decisions and we have promised in the United Nations to abide by any decision they hand down in any case we are a party to.

Senator CHURCH. In view of your own interpretation of the obligation we assume under the treaty goes far beyond the interpretation that the State Department and the Justice Department have given in their testimony, do you think it would be helpful, if this treaty is recommended for ratification, that there be an understanding that the obligation we assume, insofar as extradition is concerned, is limited to those countries with which the United States has established extradition treaties?

Senator ERVIN. No, I don't think so because I think that would nullify the clear intent of the convention. The best thing to do is to not assume the obligation that the convention puts on us in that respect.

Senator CHURCH. You don't think that an understanding then as to the extent of the obligation that is assumed would be helpful, since there

is clearly a division of opinion between the Justice Department and State Department and their witnesses and your own opinion?

Senator ERVIN. But article IX says that neither my opinion nor the opinion of the State Department nor the opinion of the Justice Department is controlling, that the opinion of the International Court of Justice is what controls. And that is the danger of the treaty. In other words, we give an international tribunal the power to tell the President of the United States and the Congress of the United States and the courts of the United States what they have to do.

In other words, under article IX it says, the International Court of Justice has supreme and final authority to make all decisions with respect to the interpretation and the application and the fulfillment of the treaty. The International Court of Justice coud say an act of Congress we passed to implement the treaty doesn't fulfill our obligation.

Senator JAVITS. Senator Ervin, is it your contention that this is the first time the United States will have granted this type of jurisdiction to the International Court of Justice.

CONNALLY AND VANDENBERG RESERVATIONS TO WORLD COURT JURISDICTION

Senator ERVIN. I think it is in a treaty with terminology as vague as the Genocide Convention. In the first place, what would be made international crimes under this convention are now domestic crimes in the United States. As you know, the Senate adopted the Connally reservation which was designed to let the United States be the judge of what falls within the domestic jurisdiction of the United States. This would bypass and render the Connally reservation inapplicable because it takes and gives jurisdiction to the World Court over things which are within the domestic jurisdiction of the United States. So the Connally reservation would be rendered inapplicable and the Vandenberg reservation as I understand it, means we do not consent to the compulsory jurisdiction of the Court except in one or two instances, and the first is that all of the nations that are parties to a multilateral treaty must be parties to the case. This expressly says any party out of the 50 or 60 or 70 parties to the convention can take us before the International Court of Justice. The Vandenberg resolution says that requirement about all of the parties to the treaty being parties to the case can be waived by the United States by specially agreeing, but this would nullify the Vandenberg reservation, it would render the Connally reservation inapplicable.

Senator JAVITS. Wouldn't you agree that we have already accepted jurisdiction of a court—even if we dissented in the treaty—on Antarctica and the treaty regarding slavery, and that the Congress has an absolute right, just as it has a right to make the Vandenberg reservation, to agree to whatever jurisdiction it wishes in a new treaty? If this is desirable in the interests of restraining others as well as ourselves, there is no inherent authority which dictates that we can't do it, is there?

Senator ERVIN. I don't know the treaty you are talking about, either one of the treaties. I am not familiar with the terms. I was under the

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impression that the treaty about forced labor and slavery had not been ratified by the United States.

Senator JAVITS. I believe it has and, Mr. Chairman, I ask unanimous consent that I may introduce at this point in the record provisions of other treaties accepting the jurisdiction of the International Court of Justice.

Senator ERVIN. I would venture to suggest that those treaties say what they are about. They tell us what acts are covered by them. Certainly slavery is a very well understood term.

Senator CHURCH. Without objection, the list of treaties containing the provisions which the Senator has referred will be incorporated.

(The information follows:)

TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES CONTAINING PROVISIONS FOR SUBMISSION OF DISPUTES TO THE INTERNATIONAL COURT OF JUSTICE, AS OF MAY 22, 1970

I. MULTILATERAL

Protocol on military obligations in certain cases of double nationality, concluded at The Hague, April 12, 1930: 50 Stat. 1317; TS 913.[1]

Convention for limiting the manufacture and regulation of narcotic drugs, concluded at Geneva, July 13, 1931: 48 Stat. 1543; TS 863.[1]

Convention on international civil aviation (ICAO), opened for signature at Chicago December 7, 1944: 61 Stat. 1180; TIAS 1591.[1 2]

Constitution of the Food and Agriculture Organization of the United Nations (FAO), signed at Quebec October 16, 1945 as amended (1950): 60 Stat. 1886; TIAS 1554, 12 UST 980; TIAS 4803.

Constitution of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), concluded at London November 16, 1945: 61 Stat. 2495; TIAS 1580.

Convention on the Privileges and Immunities of the United Nations, dated February 13, 1946: 1 UNTS 16.

Constitution of the World Health Organization (WHO), opened for signature at New York July 22, 1946: 62 Stat. (3) 2679; TIAS 1808.

Instrument for the amendment of the constitution of the International Labor Organization (ILO), dated at Montreal October 9, 1946: 62 Stat. 3485; TIAS 1868.

Convention on Road Traffic, dated at Geneva September 19, 1949: 3 UST 3008; TIAS 2487.

International Sanitary Regulations (WHO Regulations No. 2), adopted by the Fourth World Assembly at Geneva May 25, 1951: 7 UST 2255; TIAS 3625.

Treaty of Peace with Japan, signed at San Francisco September 8, 1951: 3 UST 3169; TIAS 2490.

Universal copyright convention, dated at Geneva September 6, 1952: 6 UST 2731; TIAS 3324.

Constitution of the Intergovernmental Committee for European Migration (ICEM): 6 UST 603; TIAS 3197.

Protocol amending the slavery convention of September 25, 1926 (46 Stat. 2183; TS 778), opened for signature at New York December 7, 1953: UST 479; TIAS 3532.

Protocol limiting and regulating the cultivation of the poppy plant and the production of, and international and wholesale trade in, and use of opium, open for signature at New York from June 23 to December 31, 1953: 14 UST 10; TIAS 5273.

International convention for the prevention of pollution of the sea by oil, signed at London May 12, 1954: 12 UST 2989; TIAS 4900.

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[1] By reference to the PCIJ. (References to the ICJ in place of the PCIJ in these cases is provided for by Article 37 of the Statute of the ICJ.)

[2] Appeals procedure from decision of the Council permits reference to the PCIJ (ICJ) if parties to dispute have accepted the Statute of the PCIJ (ICJ).

Supplementary convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery. Done at Geneva September 7, 1956: 18 UST 3201; TIAS 6418.

Statute of the International Atomic Energy Agency, done at New York October 26, 1956: 8 UST 1093; TIAS 3873.

The Antarctic Treaty, signed at Washington December 1, 1969:[*] 12 UST 794; TIAS 4780.

Constitution of the International Rice Commission as amended at Saigon November 19, 1960: 13 UST 2403; TIAS 5204.

Agreement for establishment of the Indo-Pacific Fisheries Council as amended at Karachi January 6–23, 1961: 13 UST 2511; TIAS 5218.

Agreement for facilitating the international circulation of visual and auditory materials of an educational, scientific and cultural character, done at Lake Success July 15, 1949: TIAS 6116; 17 UST 1578.

Convention on the settlement of investment disputes between states and nationals of other states, done at Washington March 18, 1965: 17 UST 1270; TIAS 6090.

Single convention on narcotics drugs, 1961, done at New York March 30, 1961: TIAS 6298; 18 UST 1407.

Protocol relating to the status of refugees. Done at New York January 31, 1967: TIAS 6577; 19 UST 6223.

Optional protocol to the Vienna convention on consular relations concerning the compulsory settlement of disputes. Done at Vienna April 24, 1963: TIAS 6820; 21 UST.

Convention on offenses and certain other acts committed on board aircraft. Done at Tokyo September 14, 1963: 20 UST 2941; TIAS 6768.

APPENDIX I.—A

The agreement of Paris, on reparation from Germany, on the establishment of an inter-Allied reparation agency and on restitution of monetary gold, opened for signature at Paris January 14, 1946 (61 Stat. (3) 3157; TIAS 1655), was signed on behalf of the United States on that date. It is followed by a *Resolution No. 8 on recourse to the International Court of Justice:* "The Delegates of Albania, Australia, Belgium, Denmark, France, Luxembourg, the Netherlands, Norway, Czechoslovakia and Yugoslavia recommend that: 'Subject to the provisions of Article 3 of Part I of the foregoing Agreement, the Signatory Governments agree to have recourse to the International Court of Justice for the solution of every conflict of law or competence arising out of the provisions of the foregoing Agreement which has not been submitted to the Parties concerned to amicable solution or arbitration.'" (*Department of State Bulletin*, January 27, 1946, p. 124).

All the other signatories to the Paris agreement had advised of their accession to this Resolution, as of July 22, 1948.

APPENDIX I.—B

With respect to the four Geneva conventions of August 12, 1949, for the protection of war victims, relating to: Condition of wounded and sick of the armed forces in the field (6 UST 3114; TIAS 3362); condition of wounded, sick or shipwrecked members of the armed forces at sea (6 UST 3217; TIAS 3363); treatment of prisoners of war (6 UST 3316; TIAS 3364); and protection of civilian persons in time of war (6 UST 3516; TIAS 3365). The following resolution was adopted on August 12, 1949, by the Conference of Geneva:

Resolution I.—The Conference recommends that, in the case of a dispute relating to the interpretation or application of the present Conventions which cannot be settled by other means, the High Contracting Parties concerned endeavor to agree between themselves to refer such dispute to the International Court of Justice.

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[*] Reference to the ICJ is subject to consent, in each case, of all parties to the dispute.

II. BILATERAL

A. Commercial treaties with:

Country and date	*Treaty*
Belgium, Feb. 21, 1961	14 UST 1284; TIAS 5432
China, Nov. 4, 1946	63 Stat. (2) 1299; TIAS 1871
Denmark, Oct. 1, 1951	12 UST 908; TIAS 4797
Ethiopia, Sept. 7, 1951	4 UST 2134; TIAS 2864
France, Nov. 25, 1959	11 UST 2398; TIAS 4625
Germany, F.R., Oct. 29, 1954	7 UST 1839; TIAS 3593
Greece, Aug. 3, 1951	5 UST (2) 1829; TIAS 3057
Iran, Aug. 15, 1955	8 UST 899; TIAS 3853
Ireland, Jan. 21, 1950	1 UST 785; TIAS 2155
Israel, Aug. 23, 1951	5 UST 550; TIAS 2948
Italy, Feb. 2, 1948	63 Stat. (2) 2255; TIAS 1965
Japan, Apr. 2, 1953	4 UST 2063; TIAS 2863
Korea, Nov. 28, 1956	8 UST 2217; TIAS 3947
Luxembourg, Feb. 23, 1962	14 UST 261; TIAS 5306
Netherlands, Mar. 27, 1956	8 UST 2043; TIAS 3942
Nicaragua, Jan. 21, 1956	9 UST 449; TIAS 4024
Pakistan, Nov. 12, 1959	12 UST 110; TIAS 4683
Togo, Feb. 8, 1966	TIAS 6193; 18 UST 1
Viet-Nam, Apr. 3, 1961	12 UST 1703; TIAS 4890

B. Other bilateral agreements:[4]

Treaty with Canada relating to cooperative development of water resources of the Columbia River Basin, Jan. 17, 1961	15 UST 1555; TIAS 5638
Consular Convention with Korea, Jan. 8, 1963	14 UST 1637; TIAS 5469

ANALYSIS OF TESTIMONY

Senator JAVITS. I would like to point out that I think the statement made by Senator Ervin gives us the most extreme interpretation of every aspect of this convention, as I will demonstrate in a moment; therefore, I wonder whether or not—and I will demonstrate this—I wonder whether Senator Ervin might be good enough to consider the opportunity to analyze his testimony which makes a lot of charges of a most drastic kind.

Perhaps he would be good enough to come back after we have had a chance to study and to perhaps prepare some law, just as he has obviously prepared very closely on these very drastic charges.

Among these charges, for example, Mr. Chairman, is the statement on page 7 of Senator Ervin's statement about article II of the convention, that "if the Senate should ratify the genocide convention, the duty and the power to prosecute and punish criminal homicides, assaults and batteries, and kidnapings covered by categories (a), (b), an d(e) of article II of the convention would be forthwith transferred from the States which have always had such duty and power in respect to these crimes to the Federal Government."

In short, the Senator asks us to believe we would thereby be depriving every State court of a power to try cases involving homicides, assaults, batteries, and kidnaping because he himself argues——

[4] In addition, the United States concluded economic cooperation and aid agreements with 17 countries in 1948 which contain provisions for referral of disputes to the International Court of Justice subject, however, to the self-judging domestic jurisdiction reservation of the United States.

Source: Stat.—United States Statutes at Large. UST—United States Treaties and Other International Agreements (volumes published on a yearly basis beginning January 1, 1950). TIAS—Treaties and Other International Acts Series, issued singly in pamphlets by the Department of State.

Senator ERVIN. Wait a minute. I said it came within those three definitions, that would be genocide.

Senator JAVITS. I am coming to that—because he himself argues that the question of intent can only be tried in the Federal court and, therefore, that you wouldn't know whether or not a case came within those categories until you first tried every one of those prisoners in the Federal court; so it is argued that the word "forthwith" means literally that every State court would be immediately deprived of jurisdiction.

Second, on page 9, the Senator says, "Under the Constitution of the United States, Congress does not have the power to make unlawful homicides generally Federal or international crimes."

Now I would like to find out how it is that we already have so many crimes for killing under the Federal laws: and I don't know what the Senator means by homicides generally. Perhaps he would explain that. As I understand it, many kinds of killings are punished under the Federal laws; and we pass laws quite regularly which deal with killings as the result of Federal law. What is so unusual about that?

The third point is the statement on page 12. This is but a sample. "Does it require the United States to go to war to prevent one nation from killing the nationals of another nation? The convention does not say, but article IX places the power to determine this question," to wit, whether the United States shall go to war, in the International Court of Justice.

With all respect these statements are so extreme, as a sample, that I think we ought to have an opportunity—if this is the heinous thing we are going to do to our country—to analyze this statement, to check up on the law as carefully as Senator Ervin has done, and then, if the Senator would then be good enough, after we have both had an even chance, to respond to questions on this subject. I think the charge is so strong and so extreme it puts the questioners at a great disadvantage. You make a big charge and in 2 minutes we are supposed to think up the whole body of law which represents the negation of that charge.

So I think we ought to have another chance.

Senator ERVIN. I would welcome a chance to come back and quote to the committee.

I would say just in replying to part in your statement, I challenge you to find any Federal statute that makes the crime of killing a Federal crime that is not related, confined to a killing that has some relation to a Federal purpose, to the thought of Federal purpose or on Federal territory or to prohibit a killing on account of some constitutional right under the Federal Constitution.

Senator JAVITS. I am glad the Senator has refined somewhat his very general statement, to wit, homicide generally; but I think it still leaves us with the need for a rather through scrutiny of his statement, as I say, which makes such condign broad charges and conclusions, so that we may really deal with the questioning in an intelligent way.

Senator CHURCH. It is best not to pass on the question of whether or not the subcommittee will convene again until the members confer. This meeting was held in order to oblige the Senator from North Carolina who has had a long standing interest in the treaty and we wanted to give him an opportunity to testify.

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If it is decided that another meeting should be held, we will get back in touch with you, Senator, and make an arrangement. In any case, the charges you have raised against the treaty would be very, very carefully considered prior to the time that any action is taken by the subcommittee or the full committee.

Senator ERVIN. I just want to thank the chairman and other members of the subcommittee for making it possible for me to be here and present my views on the subject.

POSSIBLE RESERVATIONS OR UNDERSTANDINGS

Senator JAVITS. Could I ask one thing. Would you think that you could draft a set of reservations or understandings, in view of the fact that you join in the universal humanitarian condemnation of what is essentially proposed as the objective of this treaty, and you say "all of us are opposed to the systemtic, planned annihilation of any national, ethnical, racial or religious group"? That is on page 16.

Would you feel that you might be able to draft what you would consider to be an appropriate set of understandings and/or reservations so that the Senate, if it thought it advisable, could ratify this highly desirable humanitarian covenant?

Senator ERVIN. It would be difficult to draw as many reservations that would protect the sovereignty of the United States against this treaty. I have seven or eight in mind but the easy way to handle this treaty is reject the treaty entirely.

Senator JAVITS. Wouldn't that run down the drain the great humanitarian objective which you yourself think is a very fine thing?

Senator ERVIN. I think that most civilized nations have got laws against what is true genocide. Not only that, they have laws against murdering anybody.

Senator JAVITS. Well I have little doubt, Senator, that Germany before and after Hitler had laws which dealt with the subject, but it didn't seem to prevent the greatest holocaust known to man.

Senator ERVIN. Yes, sir; I agree, I don't think if they had a genocide treaty it would have kept it down.

Senator JAVITS. At least there would have been some recognition of the fact that the world learns from experience, and is not sentenced, as those who refused to learn from experience, are sentenced to relive it.

Mr. Chairman, I must say that Senator Ervin is one of our finest lawyers, and I would hope very much also that we might enlist him after the give and take. Both I and I are experienced trial lawyers, and anything I have said would not one wit detract from my respect for Senator Ervin and his ability. I would hope perhaps we could, by this very process of attrition, come to some conclusion and get some clear idea as to what a man like the Senator would consider necessary, in his judgment, to enable us not to turn down such a longstanding and decently human effort, but to approve it.

(The following point-by-point rebuttal was subsequently submitted by Senator Javits:)

POINT-BY-POINT REBUTTAL

1. Senator Ervin argued that it would be particularly unwise for the United States to ratify the Genocide Convention at a time "when it is manifest that a substantial part of the American people wish to contract rather than expand their international obligations."

Answer: One must distinguish between different kinds of international obligations. It is true that many people have argued that American military commitments should be contracted. This view, however, does not entail the further argument that the development of international law should be halted. Treaties of a great variety of kinds not involving military commitments have been negotiated and have provided for more ordered relations among nations. It is hard to imagine that one would argue against the Genocide Convention on the grounds that it expands American international obligations.

2. Senator Ervin argues that under the Genocide Convention "individuals as well as persons exercising governmental power would be subject to trial and punishment for offenses which have always been regarded as matters falling within the domestic jurisdiction of the various nations."

Answer: The protection of human rights is indeed a matter of international concern. The United States has shown that it agrees with this view by ratifying the World War II peace treaties, the United Nations Charter, the Slavery Convention of 1926, and more recently the Supplementary Convention on Slavery (1967) and the Supplementary Convention on Refugees (1968).

3. Senator Ervin argues that the only reason for ratifying the Genocide Convention now is that "it would improve the image of the United States in the eyes of Russia and other totalitarian parties to the Convention, which, strange to say, have repudiated by understandings and reservations many of the provisions of the Convention."

Answer: The Convention should be ratified because the United States is unequivocally opposed to genocide. As the President in his message pointed out, U.S. ratification would be the "final convincing step that would reaffirm that the United States remains as strongly opposed to the crime of genocide as ever." U.S. ratification is long overdue.

In addition, many of the arguments against ratification have since 1950 been shown clearly to be invalid. For example, it is now clearly established that the crime of genocide is a legitimate subject for an international treaty. Seventy-five nations have already become parties to the Genocide Convention.

It is not clear which reservations Senator Ervin makes reference to when he argues Russia and others have repudiated many of the treaty's provisions. The only reservation which the Eastern bloc countries have made that cuts down a provision of the treaty has the effect of requiring agreement of all parties to a dispute before that dispute is submitted to the International Court of Justice under article IX of the Convention. This does not affect the substantive provisions of the treaty. The bloc countries have made similar reservations to numerous other treaties to which the United States is a party.

4. Senator Ervin argues that the treaty is deficient in that it does not embody the real meaning of the term "genocide." He believes the term contemplates the complete wiping out of a designated group.

Answer: It is entirely legitimate that the term "genocide" be defined in the convention for the purposes of the Convention. "Genocide" was a new term and the definition in the Convention represented the international consensus on its meaning. It seems futile to look beyond that for the "true" meaning of the term.

Does Senator Ervin really believe that an entire group must be wiped out before it is fair to say genocide has occurred? This view would seem extreme.

5. Senator Ervin argues that, whether or not the provisions of the convention are self-executing, they would immediately supersede all State laws and practices inconsistent with them and thereby deprive the States of the power to prosecute and punish in their courts acts condemned by articles II and III of the Convention.

Answer: The Convention is clearly non-self-executing in view of the requirement of article V to enact the necessary implementing legislation. The administration intends to await enactment of such legislation by the Congress before depositing our ratification and thus becoming a party to the Convention. If there is supersession of any inconsistent State laws, it will be by the Federal legislation, not by the convention. It is difficult to imagine in what way any existing State law or practice could be inconsistent with the Convention.

The enactment of implementing legislation for the Genocide Convention by the Congress need not automatically preclude the States from prosecuting the acts proscribed by the Convention. Whether or not a congressional act preempts an area of law depends on the intent of Congress. If, as could be reasonably argued, Congress did not intend completely to fill this area of law, States would be free to continue to act in this area. To ensure that States would still have

such freedom, the Congress could provide in its implementing legislation that nothing in that legislation should be construed as indicating an intent on the part of Congress to occupy, to the exclusion of State or local laws on the same subject matter, the field in which the provisions of the legislation operate.

6. Senator Ervin argues that the Convention could somehow alter the powers of the Congress under the Federal Constitution.

Answer: The Congress has the power under the necessary and proper clause of the Constitution to enact legislation necessary to implement a valid treaty. *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). The Genocide Convention would not, however, provide an example of a case where Congress would lack the power to enact the required implementing legislation absent the treaty. Genocide is a crime against the laws of nations. Congress is explicitly given the power to define such crimes under article I, section 8, clause 10, of the Constitution. The Genocide Convention would, although entered into under the treaty power (art. II, sec. 2, clause 2), require implementing legislation. The fact that Congress enacts a statute pursuant to a treaty, instead of under its otherwise delegated powers, does not alter its competence.

7. Senator Ervin argues that ratification of the Genocide Convention would have a drastic effect on our whole system of criminal justice because many crimes which are now crimes under State law could, with the addition of an allegation with respect to intent, be made Federal crimes. This, he argues, would create a situation where it would be uncertain whether it was appropriate to go to a Federal or State court, and would allow for dual prosecution of defendants.

Answer: The intent requirements for the crime of genocide are set forth in article II. In order for genocide to be committed, an act must be directed against the individuals involved qua members of a particular group, and there must be a specific intent to destroy the group as such in whole or in part. It would be reasonably difficult to prove this intent element in ordinary homicide cases, and it would seem far-fetched that United States attorneys would institute a large number of unfounded prosecutions. If an unfounded prosecution were instituted, Federal criminal procedure provides many safeguards to ensure that the prosecution would be dismissed. Since the standard is so stringent. It is not reasonable to argue that a major incursion into areas of State law would occur.

8. Senator Ervin suggests that. under article II(c) of the Genocide Convention, State or county officials, who refuse to give a member of one of the four designated groups the amount of welfare benefits deemed desirable, may be prosecuted for genocide.

Answer: Article II(c) of the Convention provides that one of the ways of committing genocide is by "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." This provision is aimed at conditions of life inflicted upon the group which are meant to cause death or grave bodily injury. Generally speaking, the provision covers "slow death" measures. See P. Drost, The Crime of State—Genocide, pp. 86–87 (1959). Denial of adequate welfare benefits is of a completely different magnitude than measures calculated to bring about slow death. In addition, the requisite intent to destroy in whole or in part the members of a group (see answer 7) would be lacking.

9. Senator Ervin argues that the provision of article III(c), which makes direct and public incitement to commit genocide punishable, might deprive public officials and citizens of America of the right of free speech.

Answer: Under current law, while mere advocacy of illegal activities may well be protected by the first amendment, direct and public incitement to commit illegal activity is surely not protected. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). Incitement crosses the bounds between protected and unprotected speech. The provision of the Genocide Convention therefore does not violate the Constitution. Moreover, were there any conflict, the first amendment clearly would control. *Reid* v. *Covert*, 354 U.S. 1 (1957); *Geofroy* v. *Riggs*, 133 U.S. 258 (1890).

10. Senator Ervin asks what is meant in article III(e) by "complicity in genocide."

Answer: The prohibition against the complicity is clearly aimed at accessoryship in crime of genocide, as defined in article II (not the other genocide acts listed in article III). When Congress enacts implementing legislation for the Genocide Convention, it will not be necessary to enact a special provision imple-

menting article III(e) because accessoryship in Federal crimes is already outlawed by the United States Code. 18 U.S.C. §§ 2, 3 (1964).

11. Senator Ervin believes that the term "mental harm" in article II(b) of the convention is totally incomprehensible.

Answer: "Mental harm" means—and the administration has proposed an understanding to make this clear—permanent impairment of mental faculties. Thus, before a charge can be sustained, it must be proved that permanent impairment of mental faculties in fact occurred and that the defendant brought about this injury with the specific intent of destroying one of the protected groups. Thus, the standard is rigid enough to protect against frivolous allegations of genocide.

12. Senator Ervin seems troubled that article VIII of the convention would allow any contracting party to call upon the competent organs of the United Nations to take appropriate action for the prevention and suppression of genocide.

Answer: Article VIII does not, and indeed could not, change the jurisdiction of the United Nations. It merely confirmed the existing situation: members of the United Nations may already go to competent organs in appropriate cases.

13. Senator Ervin fears that article I of the Genocide Convention could require the United States to go to war to prevent the crime of genocide.

Answer: Article I confirms the principle expressed in Resolution 96(1) of the United Nations General Assembly that genocide is a crime under international law in time of peace or in time of war. The parties to the convention undertake to prevent and punish this crime in the manner set forth in subsequent articles of the convention. Aside from this declaration, the article has no substantive effect, the main operative provisions being contained in articles II–VII.

14. Senator Ervin argues that article VI imposes upon the Congress an implied commitment to support the creation of an international penal tribunal.

Answer: In the more than 20 years since the Convention was adopted no international penal tribunal has been created. While one was proposed at the time of the drafting of the convention, this proposal has long been dormant and there is no reason to suspect that it will be revived. If such a court were proposed in the future, Senate advice and consent would at that time be necessary for the United States to adhere to the treaty establishing the court and accept its jurisdiction. The Convention clearly would not require the United States to accept the jurisdiction of such a court.

15. Senator Ervin argues that the Genocide Convention would make American soldiers fighting abroad triable in the courts of our enemies for killing or seriously wounding members of the enemies' military forces.

Answer: First, it should be pointed out that combat actions of American troops against enemies do not constitute genocide. For example, it is difficult to conceive that acts committed by U.S. troops in Vietnam could fall within the definition of genocide in article II. The article requires an "intent to destroy, in whole or in part, national, ethnical, racial, or religious groups, as such." Our soldiers are fighting to help the South Vietnamese defend themselves and therefore acts committed against other Vietnamese would not constitute genocide.

Of course, American soldiers who are captive in the country of an enemy of the United States could be subjected to prosecution by the enemy country for the crime of genocide regardless of whether the United States has ratified the Genocide Convention. Although we would feel such treatment entirely unjustified, we would be powerless to do anything about it other than to protest to the country or to the U.N. The action of the Senate, in giving its advice and consent to ratification, would therefore have no relevance to this question.

16. Senator Ervin dislikes the fact that the Genocide Convention provides in article IX that disputes between parties relating to the Convention's "interpretation, application, or fulfillment" shall be submitted to the International Court of Justice. He believes this provision nullifies the Connally and Vandenberg reservations to the jurisdiction of the Court.

Answer: Article IX is an entirely appropriate provision. The United States has, in many cases in its treaties, provided that disputes relating to interpretation, application, and fulfillment of a treaty shall be referred to the ICJ. Recent examples where the Senate approved similar provisions are the Convention on the Privileges and Immunities of the United Nations (1970), the Refugee Protocol (1968), and the Supplementary Slavery Convention (1967). A list of treaties with similar provisions has been included in the record of these hearings.

Article IX does not nullify the Connally or Vandenberg reservations. The Connally amendment, or self-judging aspect of our domestic jurisdiction reservation, could be employed to prevent the International Court of Justice from decid-

ing a case brought against the United States based on our 1946 across-the-board acceptance of compulsory jurisdiction to any international legal dispute under paragraph 2 of article 36 of the Court's statute. The Vandenberg reservation, or multilateral treaty reservation, could prevent jurisdiction under the same paragraph of the statute in cases arising out of a multilateral treaty where all the parties affected by the decision are not parties to the case or the United States has not specifically agreed to jurisdiction. These reservations could not, however, be invoked under article IX of the Genocide Convention since the basis for the Court's jurisdiction would be paragraph 1 of article 36 of the statute, which gives the Court jurisdiction to decide legal disputes "specifically provided for . . . in treaties and conventions in force." Article IX of the convention thus has the effect of avoiding the application of the reservations in the extremely small class of potential cases that may arise from unresolved differences over the interpretation, application, or fulfillment of the convention.

Senator ERVIN. I would be pleased to draw the same reservations that the subcommittee of the Foreign Relations Committee suggested in 1950. I would be glad to draw a reservation such as Judge Phillips said: No American is going to be tried for any act of genocide in this country except in Federal courts where he would have the right secured to him by the Bill of Rights. I would be glad to do like the Russians and a large percentage of the other nations of the world, draw a reservation to the effect that article IX doesn't apply to us.

Senator CHURCH. Some of the understandings to which you have referred are in your testimony and, of course, they are available to this subcommittee.

It has the full record of the previous hearings and all of them will be taken under advisement.

Senator ERVIN. I will be glad to draw the other two and submit them to the committee. I am available to the committee.

Senator CHURCH. Thank you very much. We will be in touch with you.

(Whereupon, at 3:25 p.m., the committee was adjourned.)

The CHAIRMAN. I would just like to say that one of the great privileges I had, Senator Helms, was serving as ranking member of the Governmental Affairs Committee while Senator Sam Ervin was chairman.

No colleague has been greater in wisdom or greater an inspiration to me on many, many issues and I share your admiration for him.

Senator HELMS. I thank you for those comments and I shall relay them to him.

Mr. Chairman, the reason Senator Ervin's testimony is so important is that he addressed specifically the problems which later were addressed by the three understandings and one declaration which were recommended by this committee. I believe that there are only two present members of the committee now sitting, Senator Percy and Senator Pell, who were on the committee at the time of Senator Ervin's testimony in 1970.

I have copies of Senator Ervin's testimony here this morning for members of the committee and the press, and I hope that it will be examined carefully.

Now, with regard to Senator Ervin's objections, the majority of them, as I said earlier, were addressed by the committee and accepted. However, there remain two points that have not been settled; points of great significance. They are probably the two reasons why strict constitutionalists—and I am one of them—have been heretofore reluctant to approve this treaty. In my opinion, if these two points can be resolved satisfactorily, most of the reluctance would evaporate.

The first of the two issues relates to the supremacy clause of article VI of the Constitution. A treaty becomes the law of the land, and conceivably could enlarge or diminish the rights, jurisdiction, and powers embodied in the U.S. Constitution. Therefore, under the treaty, some could argue that we have the authority to pass a law which would be unconstitutional without the treaty. Or the Supreme Court might use the treaty to create new legal doctrine not justified by the Constitution.

As Senator Ervin said, and I quote him:

> This means that the provisions of the Genocide Convention would automatically supersede all State laws and practices inconsistent with them, and would nullify all provisions of all acts of Congress and prior treaties of the United States inconsistent with them.

He went on to say:

> While Congress could repeal provisions of the Genocide Convention by future legislation, the States would be bound by them as long as the Convention remained in effect. Moreover, the Genocide Convention would immediately require and authorize the Congress to enact legislation implementing its provisions, even though such legislation were beyond the power of Congress in the absence of the Convention.

Mr. Chairman, the second problem has to do with article IX of the convention under which we agree to compulsory jurisdiction before the International Court of Justice on matters relating to genocide.

Again, let me quote Senator Ervin:

> Under this article, the International Court of Justice would be empowered to decree that the President of the United States, as chief executive officer of the United States, had interpreted and applied the provisions of the Convention incor-

rectly and by so doing imposed upon the President of the United States its notion as to how the Convention should be interpreted and enforced; the power to adjudge that legislation enacted by Congress to give effect to the provisions of the Convention was insufficient to fulfill the obligations imposed upon it by the Convention; and the power to adjudge that the Supreme Court of the United States and the Federal courts inferior to it had interpreted and applied the provisions of the Convention incorrectly.

Mr. Chairman, I will not be much longer. Let me conclude.

When the United States accepted the jurisdiction of the International Court of Justice in 1946, the Senate specifically exempted any domestic matters from ICJ jurisdiction, "as determined by the United States." That last phase is the so-called Connally amendment. The Genocide Convention would abrogate the Connally amendment as it applies to genocide.

Mr. Chairman, I have prepared two understandings to cure the problems pointed out and emphasized by Senator Ervin. The first merely restates what I understand to be the administration's policy; namely, that no implementing legislation would be valid that is not valid absent the convention. The second merely affirms existing law; namely, that the United States would not accept compulsory jurisdiction on domestic matters as determined by the United States.

Neither of these proposals would take away from the importance or operation of the Genocide Convention but they would protect us from unforeseen mischief in the future.

Mr. Chairman, I would like to submit these proposals to the administration representatives who are here this morning, and I would like to have their study and comment. As a matter of fact, I have already mentioned them to the gentlemen, and I would hope that we would have their recommendations before the markup.

In conclusion, let me read the two understandings that I propose which I think will solve a great many of the misapprenhensions or apprehensions about this convention.

The first that the U.S. Government understands and construes the words "in accordance with their respective Constitutions" in article V to mean that the present convention or any provision thereof shall become effective as the domestic law of the United States only through legislation which would be valid in the absence of the convention.

And the second is that the U.S. Government understands and construes article IX of the convention in accordance with the 1946 declaration of the U.S. Government submitting to the jurisdiction of the International Court of Justice pursuant to article 36(2) of the statute of the Court.

I have an explanation of the two understandings which I would ask, Mr. Chairman, be made a part of the record. And with that I conclude, and I want to thank you and Senator Pell again for your graciousness in allowing me to go out of turn so that I can go to another committee meeting.

Thank you, Mr. Chairman.

[Explanation of proposed Helms understandings on the Genocide Convention follow:]

EXPLANATION OF PROPOSED HELMS UNDERSTANDINGS

1. It is the position of the Administration that there is nothing in the Genocide Convention that would derogate from the U.S. Constitution. However, at some future date, there is the possibility that a court would attempt to interpret domestic legislation, including the implementing legislation for the Convention, in a manner which would expand or diminish rights, powers, or authority under the Constitution. The first Helms understanding provides legislative history making it clear that the U.S. interpretation of the Genocide Convention is that it neither adds nor subtracts from the Constitution under the supremacy clause. The Helms understanding merely makes explicit the Administration position, without affecting the purpose or operation of the treaty.

2. The second Helms understanding merely upholds current law. It accepts the jurisdiction of the International Court of Justice in exactly the same way that we accept it for every other issue—that is to say, we reserve the right not to submit domestic matters, as determined by the United States. This would assure the President the right to decline to submit to jurisdiction for matters such as Indian rights, undocumented aliens, prisoners' rights, etc., should such issues be brought relating to the interpretation, application, or fulfillment of the present Convention.

It should be noted that 17 nations have completely reserved Article IX. However, the United Nations Charter, Article II (7) states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, or shall require the Members to submit such matters to settlement under the present Charter." It is clear therefore that the ICJ (which is an agency of the UN) cannot legally deal with domestic matters. The 1946 U.S. Declaration of submission to the jurisdiction of the ICJ (S. Res. 196, 79th Congress, 2nd Session) was amended (the so-called Connally Amendment) with this in mind.

The Helms understanding, therefore, does not change or alter the legal situation with regard to the Genocide Convention. It upholds not only current law, but Article II of the Charter as well. As an understanding, it should in no way be compared with the reservations of the 17 nations on Article IX of the Convention.

The CHAIRMAN. Thank you very much, Senator Helms. We do appreciate very much indeed your statement and also the submission of these two understandings, and we will ask the administration in your absence this morning for their opinions on those two understandings.

My statement will be a relatively brief one, and then we will revert to regular order for the record purposes.

This morning the Committee on Foreign Relations meets to review the status of the International Convention on the Prevention and Punishment of the Crime of Genocide and the arguments for and against its ratification.

The Genocide Convention has been before the Senate for 35 years and has been reported favorably by this committee no less than four times. This morning's hearing marks the 12th time since 1950 that this committee has convened to hear public testimony on the convention. Yet, it has been debated in this Senate at length only once, in 1974, when 2 attempts to break a filibuster mustered 55 votes, a majority of the Senate but not the two-thirds that would be required for Senate approval in accordance with the rules of that time.

Since that time the principal organization opposing ratification, the American Bar Association, reversed its position and now strongly supports ratification. The most recent hearing held by this committee on the convention occurred in December 1981. At that time, Senators Thurmond and Proxmire, former Senator Javits, and representatives from the American Bar Association, the Liberty Lobby, and the Ad Hoc Committee for the Genocide Convention testified before the committee. However, the key witnesses, the ad-

ministration spokesmen, were not able to testify because a detailed review of the convention was then underway.

Therefore, I held off on reporting the Genocide Convention out of the committee because without the President's support there was virtually no chance of it being approved by the Senate.

Certainly the wait has been well worth enduring. I am deeply gratified by President Reagan's decision to lend his strong support to Senate approval of the Genocide Convention. I am confident that with the President's firm backing, the Genocide Convention can be approved by the Senate, reaffirming America's fundamental commitment to human rights and the sanctity of human life.

I ask unanimous consent that detailed statements of my position and further amplification be incorporated in the record at this point.

[The material referred to follows:]

SENATOR PERCY'S STATEMENT AT THE HEARING ON THE GENOCIDE CONVENTION, DECEMBER 3, 1981

The CHAIRMAN. This morning, the Committee on Foreign Relations will review the status of the International Convention on the Prevention and Punishment of the Crime of Genocide and the arguments for and against its ratification.

The Genocide Convention has been before the Senate for 32 years and has been reported favorably by this committee no less than four times.

This morning's hearings mark the 11th day since 1950 that this committee has convened to hear public testimony on the Convention. Yet it has been debated in the Senate at length only once, in 1974, when two attempts to break a filibuster mustered 55 votes, a majority of the Senate, but not the two-thirds that would be required for Senate approval.

Since that time the principal organization opposing ratification, the American Bar Association, reversed its position and now strongly supports ratification. We will be hearing from the ABA later this morning. I am very pleased to indicate that, in addition to the distinguished Senators that we have with us this morning to start this hearing—who will be appearing on both sides of the issue—Senator Javits, our former colleague and the former ranking member of this committee, also will be here at around 11:30 to testify.

Speaking for myself—because this is not the kind of issue that sometimes we have when we hear an issue for the first time—I have participated in debates on this issue before, and my position on this treaty is reasonably well known. It has been publicized one way or the other, favorably and unfavorably, depending on the writer's point of view.

I support ratification of the Genocide Convention, as I have ever since coming to the Senate 15 years ago. It remains today what it was at the time of its original negotiation: an important statement by the nations of the world that those who would perpetrate the unspeakable crime of trying to exterminate a national, ethnic, racial, or religious group must not be allowed sanctuary anywhere in the world.

Yet, the significance of this convention is not merely symbolic. It forms part of a general network of treaties which declare certain actions to be international crimes, justifying concerted action by all countries to bring the perpetrators to trial. However new and untried this concept may have seemed to the Senate in 1949, there is nothing radical or unusual about it today. Just last summer, the Senate approved by a vote of 98 to 0 two treaties which provide for just such international action, the first against those who take hostages for political purposes, and the second against those who divert nuclear materials for unauthorized use.

Another such treaty directed against those who seize diplomats for political purposes provided an important basis for our case against the Government of Iran, and added to the wide condemnation of the ayatollah's government by the rest of the world for the holding of American hostages. If we can agree to condemn and seek to punish such violators of international law, why should we not agree to treat the perpetrators of genocide in the same manner?

In short, I think the Senate's original concerns and hesitations about the Genocide Convention have not stood the test of time. They were raised in the course of debate about the treaty power and about the authority of the Federal Government,

which long since have been resolved. most of the arguments which are made against ratification are either outdated, misinformed, or based upon farfetched interpretations of the treaty's provisions. The remaining arguments are simply not persuasive to me, nor do I think they would be to most Americans.

Ratification by the United States may be a very small step in the scheme of things, but it does no credit to a great nation like the United States to hesitate in taking a small step forward for reasons which are not sustained by a serious consideration of American interests in the world.

Clearly, the ultimate prospects for ratification of this convention will depend in large part on the position taken by the Reagan administration. During his recent confirmation hearing, the new Assistant Secretary of State for Human Rights and Humanitarian Affairs, Elliot Abrams, indicated that the administration had only just begun its review of this treaty. He expressed some initial and positive personal views on ratification of the Genocide Convention, which I hope will be widely shared in the rest of the Government.

I hope the committee's hearing this morning will assist in that process. It is my present intention to await the outcome of the administration's review before considering further action in the committee, provided that a reasonable time, and only a reasonable time, is taken by the administration in this regard.

Our first witness this morning is my esteemed colleague, the President pro tem of the Senate, the chairman of the Senate Judiciary Committee, Strom Thurmond of South Carolina, and my seatmate. We don't always agree as we sit alongside each other, as we probably will not agree this morning. But when we take into account that the American Bar Association, a highly respected organization, up until recently opposed this treaty, and had many reasons which it gave for that opposition, now has reversed its position, we know that good men are on both sides of this issue. This is not a clear-cut issue. The purpose of this committee's hearing is to give open hearing to those people for whom we have great respect, who have strong convictions on one side or another of the issue.

The CHAIRMAN. As long as I can remember, Senator Proxmire has given a daily speech on the floor of the Senate on the Genocide Treaty. There has been no Senator more tenacious and, I might say, more patient and understanding. He is a practical Senator, but he feels deeply about this, though he recognized it was futile for us to take the time of the Senate if we did not have the support of the administration because there could be no possibility of invoking cloture without the support of an administration, and that goes for every administration since the first consideration of this matter.

This morning we have some very distinguished witnesses from whom we are looking forward to hearing. That will then complete the testimony, but we will keep the record open for other organizations and individuals whose viewpoints may be of help. And I particularly enjoyed my meeting yesterday with His Holiness, the archbishop of the Syrian faith, and he will submit a statement for the record.

But this morning our witnesses are Elliott Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs; Davis Robinson, legal advisor, Department of State; and Theodore Olson, Assistant Attorney General, Office of Legal Counsel of the Department of Justice.

Our witnesses can fully explore with us the administration position, how it was arrived at, and detail their judgment and wishes with respect to the action of the Senate now. Certainly your explanation as to why, after such deliberate thought, it is in the best interests of the United States to ratify the Genocide Convention and how the administration was able to reach this conclusion and how it is consistent with the Constitution of the United States, what your attitude would be on the two understandings that are proposed by Senator Helms would be welcome, and we welcome both

of you, but first I will turn to Senator Pell for any comments that he would like to make.

Senator PELL. Thank you, Mr. Chairman.

Today's hearing on this convention is the 12th hearing conducted by our committee on the convention since it was first submitted on June 16, 1949. On five separate occasions I have joined the majority of the committee in voting to report the convention to the floor of the Senate. Regrettably, the Senate has never been able to vote on the issue. It has never been permitted to vote on the issue.

I believe the prospects for approval of the Genocide Convention are better today than they have been at any time since 1949. President Reagan's endorsement of the treaty after a lengthy 3-year review provides a very real boost. I hope the administration will follow through on its statement of support by working with the Senate leadership to ensure that the convention is considered and voted on this session.

Approval of this convention will fulfill a personal goal I have had over my 24 years here in the Senate. In addition to voting for the convention, I have over the years badgered successive administrations and Foreign Relations Committee chairmen to move this convention forward. Most recently, in May, I wrote to Secretary Shultz to urge the administration to complete its review of the Convention.

Also, the passage of this convention will fulfill the dream of the Polish refugee, Raphael Lemkin, who I remember so well in these corridors and around the world as he struggled over the years to secure the end that genocide should be punished and who actually created and coined the very phrase "genocide."

Its passage also will fulfill the dream of my own father who in 1943 and 1944 served as the U.S. Representative to the United Nations War Crimes Commission. My father, Herbert Pell, argued forcefully that such heinous acts as the wholesale slaughter of people because of race or religion should be considered a war crime, even if the State Department and others alleged that acting against such a crime would be ex post facto or after the fact, and therefore even though the acts were heinous, the fact that they had been carried out before the law was made meant that we should not act against them.

By going public as my father did, he was able to secure a reversal of the American policy in this regard, making a crime like genocide a war crime, although it did cost him his job.

Later this morning, I trust I shall cast my sixth committee vote in favor of the Genocide Convention, and I would like to salute particularly two of my colleagues whose efforts on behalf of the convention have made this vote possible—and that is hoping we get to it this morning. These are Senator Proxmire who today gave his 2,996th floor speech in favor of ratification of the convention, and Chairman Percy who scheduled this vote just 1 week after the President's announcement.

I hope the Senate leadership will take their cue from Senator Percy and schedule floor action as soon as possible. After 35 years, it is long past time for the United States to join the rest of the world in recognizing genocide, the greatest of all crimes, as a crime under international law.

The CHAIRMAN. Thank you, Senator Pell, very much. And may I add a third person to that—yourself, whose consistent support through the years has always been well known. We appreciate your leadership in this area.

Senator Pressler.

Senator PRESSLER. Let me add to what has been said that I am very glad that this treaty is before us. I find it somewhat strange that all of a sudden we are dealing with it.

The first visitor I had when I came to the U.S. Senate was Senator Proxmire. I was somewhat curious as to why he was coming to see me, and he discussed this treaty, on which he has worked for a long time. I must say I was surprised to open the newspaper and read that the administration had endorsed it. I think it fits in with my feeling that in Ronald Reagan's second term he will surprise us all, and his greatest achievements are going to be some arms control agreements.

Now, that is not necessarily directly related to this. I predict he is going to go down in history as the man who negotiated a very substantial arms control agreement with the Soviet Union, now that we have had the military buildup, when he enters his second term.

So I say that we will have some more pleasant surprises.

Also, let me add that the crimes that have been mentioned are very significant, but one crime that has been going on in the world that is not mentioned by very many people is the Kampuchea-Laos-Vietnam situation. I served in the Army in Vietnam and used to listen to the radio and heard about the crimes that we were supposedly committing. If those same people would look at what has happened in Kampuchea, Laos, and Vietnam, they should be disturbed. I have not seen any demonstrations in the streets, I have not heard any famous actors or actresses taking up the cause and so forth.

But I think a treaty such as this would apply in Kampuchea, Laos, and Vietnam, at least as I read it, and I would appreciate the witnesses' statements on that. So I am glad we are taking this up. It comes as a pleasant surprise, but I think we are going to have many more of those in the weeks and months ahead.

The CHAIRMAN. Thank you very much.

Any other statements to be submitted by committee members will be printed in the record at this point.

Gentlemen, you can proceed in whichever sequence or order you would like to.

Secretary Abrams.

STATEMENT OF HON. ELLIOTT ABRAMS, ASSISTANT SECRETARY OF STATE FOR HUMAN RIGHTS AND HUMANITARIAN AFFAIRS

Mr. ABRAMS. Mr. Chairman, it is an honor for me to be here this morning in support of the Convention on the Prevention and Punishment of the Crime of Genocide.

I would like to begin by expressing my own personal gratitude to you for scheduling a hearing with such dispatch after the administration's endorsement—the President's endorsement of the treaty last week.

A long list of eminent Americans from Congress, from the executive branch, and many dedicated private citizens have labored over these past 35 years to see the convention receive the advice and consent of the Senate. Both Republican and Democratic administrations have worked for ratification.

Today's hearing marks another milestone in this distinguished effort. It is the administration's hope that the Senate will finally provide its advice and consent to the U.S. ratification of the Genocide Convention and add America's moral and political prestige to this landmark in international law.

As Senator Helms noted, the Genocide Convention was born from the ashes of the Holocaust. The horrors of the Nazi death camps prompted the rise of an international treaty that recognized that in this, the bloodiest of centuries, technology employed in the hands of totalitarian tyrants made possible mass murder of a special kind. As stated precisely in the language of the Convention, genocide is defined as certain specified acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such. These acts include:

First, killing members of the group.

Second, causing serious bodily or mental harm to members of the group.

Third, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

Fourth, imposing measures intended to prevent births within the group.

Fifth, forcibly transferring children of the group to another group.

As Senator Javits remarked eloquently in hearings before this committee in 1977, "genocide is murder and more." Such acts are a crime against humanity itself and merit the special sanctions of the international community.

Mr. Chairman, the United States distinguishes itself by the moral dimension it brings to its foreign policy. As Secretary of State Shultz has stated, human rights are at the core of our foreign policy because they are essential to our conception of ourselves. The United States, one of the chief recipients of the survivors of the Holocaust, has found itself in the embarrassing position in international fora of having failed to ratify the convention, thereby not expressing formally through an international treaty our staunch opposition to the heinous crime of genocide.

Many of our adversaries in the world, particularly the Soviet Union, have ratified the convention and they frequently use our failure to do so to castigate us unfairly and propagandistically, and to denigrate our strong human rights posture and divert attention from their abuses.

Ratification of the Genocide Convention will reduce, for those to whom human rights are only empty words, the opportunity to attack the United States.

Of course, reasons have been stated in the past for opposing the treaty. Some make the point that present U.S. laws, particularly the Federal civil rights laws, prohibit and punish acts that fall under the Genocide Convention, and that we need not enter into another international convenant.

However, such arguments ignore both the unique character of this horrible crime and the fact that one of the major purposes of the convention is to oblige states to pass national legislation against it.

Moreover, such arguments ignore the great symbolic value of the Genocide Convention and the benefits which will accrue to our public diplomacy by U.S. adherence to the convention. It is interesting that the news agency TASS has already started to attack the Reagan administration for expressing its support for the convention. The Soviets harshly criticized a State Department spokesman because he referred to the convention's symbolic value, but the Soviets frequently attack what they fear most. They know that symbols convey meaning and they also know that the United States lending its political and moral prestige to the convention will enormously enhance its value as an instrument of world opinion to prevent genocide.

Constitutional questions have been raised in the past over the convention. It is quite understandable that people are concerned that international law not trifle with or contradict the American Constitution, one of the greatest documents in the fragile history of human liberty and a document which has spawned institutions that have guaranteed and extended liberty for 200 years.

After comprehensive legal review by both the State and Justice Departments and with the one declaration and three understandings, which the committee in 1976 proposed for inclusion in the resolution of ratification, we are firm in our conviction that all constitutional questions have been answered. These questions have centered mainly on the issues of states rights and extradition. The other witnesses today are prepared to address these issues in detail.

Before closing, I would like to note that when the history of U.S. ratification of the convention is written—and our fervent hope is that it can begin to be written shortly—the endorsement by the American Bar Association of the Genocide Convention in 1976, after having previously opposed it, will prove, I think, to have been a decisive event. The ABA has worked tirelessly since then to see the convention ratified, and its legal explanation and defense of the present proposals should satisfy all of the prior constitutional objections to the convention.

Mr. Chairman, we have all delayed too long. The best time for advice and consent to ratification is right now.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Robinson.

STATEMENT OF DAVIS R. ROBINSON, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. ROBINSON. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the committee, I am honored and pleased to appear before you this morning to address the convention on the Prevention and Punishment of the Crime of Genocide or the Genocide Convention as it is generally known.

The executive branch has now completed an extensive review of the Genocide Convention, including the questions raised in the past in connection with its consideration by the Senate of the United States. The President undertook this review to examine anew whether ratification of this convention continued to be in the best interests of the United States.

I am very pleased to inform the committee that, having completed that review, this administration believes that no legal impediment exists to the ratification of this important convention, subject to the three understandings and the one declaration which the Committee on Foreign Relations itself reported in 1976.

The Genocide Convention can be briefly summarized. The convention defines the act of genocide, confirms that it is a crime under international law, obliges states which are parties to the convention to enact legislation to make genocide a crime under national law, and specifies that the parties pledge themselves to grant extradition in accordance with their laws and treaties in force. For the purpose of extradition, genocide shall not be considered a political offense.

The convention also provides that disputes between parties relating to the convention's interpretation, application, or fulfillment shall be submitted to the International Court of Justice [ICJ].

The main thrust of the convention is to require parties to outlaw genocide within the structure of their own legal systems. Thus, in addition to the Senate's providing advice and consent to the convention's ratification, the Congress in order to implement the convention must also enact legislation which would add to the Criminal Code a new crime called genocide, and set forth criminal penalties for its commission.

Articles II and III of the convention provide the contours of what such legislation would contain. As Assistant Secretary Abrams has already pointed out, article II defines genocide to be any one of five types of acts committed with "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such."

Article III of the convention provides for the punishment of genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide, and complicity in the commission of genocide.

Since its submission to the Senate by President Truman in 1949, the Genocide Convention has been considered by this distinguished committee on at least seven occasions. The committee has heard from distinguished scholars concerning whether significant legal impediments existed to ratification of this convention. I will not today attempt to restate comprehensively these legal discussions. Instead, I would like to discuss briefly two major legal issues which have previously been considered in testimony before this committee. And then my colleague, Assistant Attorney General Olson, will add another.

It has been argued that genocide is not a proper subject for treaty making and is essentially a subject within the domestic jurisdiction of sovereign states. The United States is already a party to numerous multilateral treaties which deal with diverse matters of concern to the international community, including in the human rights area treaties on slavery and refugees.

Recent actions by the Senate, for example, in giving advice and consent to the convention on the taking of hostages, reflect the wide range of legitimate topics for international concern. In the present case, 96 countries by ratifying or acceding to the Genocide Convention have indicated their belief that the subject of genocide is a proper concern of nations. International human rights are, in our view, properly a subject of international concern. Accordingly, I believe that the Genocide Convention is clearly within the treaty making powers of the United States.

It as also been argued that the ratification of the Genocide Convention might force the United States at some future date to extradite Americans for trial abroad on trumped-up charges of genocide. I would like, with your permission, to take this opportunity to allay any apprehensions on this point. The careful definition of genocide contained in the convention, as clarified by the first two proposed understandings of this committee in 1976, and the procedural safeguards built into our own extradition process, will prevent such a contingency from occurring.

The definition of genocide in the convention requires the presence of specific elements, in particular, a specific intent and the commission of one or more defined overt acts. Under the convention, genocide requires for its commission the specific "intent to destroy the group, in whole or in part, as such."

The administration supports the clarification in the first understanding proposed by the Foreign Relations Committee in 1976 to the effect that this intention must be one to destroy the group by specified acts—and I quote—"in such manner as to affect a substantial part of the group concerned." This, in effect, distinguishes the international crime of genocide—that is, acts taken with intent to destroy groups—from the domestic crime of homocide—that is, acts taken with the intent to destroy individuals.

The second understanding proposed by the committee and supported by the administration specifies that "mental harm" means permanent impairment of mental faculties. Under article VII of the convention, the parties pledge to grant extradition of persons charged with genocide—and I quote—"in accordance with their laws and treaties in force." Thus, the United States would not be required to surrender an individual to any nation if, for example, that country fails to make a showing of probable cause or the United States finds the request for extradition to have been politically motivated.

Under the terms of the convention, once it has entered into force, there shall, however, be no defense to extradition on the grounds that the crime itself was a political one.

It should be emphasized that the Genocide Convention does not purport to be an extradition treaty itself. Furthermore, no person could be extradited from the United States for trial in a foreign country on a genocide charge unless we have a bilateral extradition treaty with that country making genocide an extraditable offense. No. U.S. treaty presently in force does so.

Six recent treaties, those with Costa Rica, Ireland, Italy, Jamaica, Sweden, and Thailand, to which the Senate recently gave its advice and consent, but which have not as yet entered into force, contain a general formula under which extradition would lie for of-

fenses that are crimes punishable in both the United States and the country for more than a specified period of imprisonment. For all but these six treaties, amendment of U.S. bilateral extradition treaties to include genocide will require Senate advice and consent before they would afford a basis for extradition as a result of United States ratification of the Genocide Convention.

Furthermore, no existing bilateral extradition treaty, whether the older type which lists specific crimes or the more recent type containing the formula, will cover genocide unless and until the U.S. Congress adopts the necessary implementing legislation, to execute or implement this non-self-executing treaty. In this connection, the proposed declaration states that the United States will not deposit its instrument of ratification to the convention until after such legislation has been enacted.

Thus, in every case, further congressional action would be required before genocide would become an extraditable offense. This would include passage of implementing legislation and, in addition, in all but these six extradition treaties I mentioned, Senate approval of amendments to those treaties.

I should also note that our extradition treaties contain several procedural safeguards which apply regardless of the extraditable offense. For example, under each bilateral extradition treaty the state requesting extradition must produce sufficient evidence to persuade both a U.S. court and the Secretary of State that there is probable cause to believe the person sought committed the offense with which he is charged.

Finally, the negotiating history of the convention, confirmed in the third proposed understanding, makes clear that trial for genocide may also occur in the country of which the defendant is a national. In this regard, the implementing legislation, in our view, should enable the U.S. authorities to prosecute a genocide offense committed by U.S. nationals outside the United States as an alternative to responding affirmatively to a request for extradition.

As previously noted, as the 1976 Foreign Relations Committee declaration supported by the administration makes clear, the United States will not deposit the instrument of ratification to the Genocide Convention until after such implementing legislation has been enacted.

Mr. Chairman and members of the committee, I have not attempted to canvas in detail the other legal issues which have been debated before the committee in the past during its consideration of the Genocide Convention. Previous discussions before this committee by representatives of the Office of the Legal Adviser of the Department of State and by representatives of the Department of Justice have already addressed these questions comprehensively.

I will, of course, be happy to answer any questions. This concludes my statement.

I would be pleased if you would permit my colleague, Mr. Olson, to make a brief statement.

[Mr. Robinson's prepared statement follows:]

PREPARED STATEMENT OF DAVIS R. ROBINSON

Mr. Chairman, Members of the Committee: I am pleased to appear before you on the Convention on the Prevention and Punishment of the Crime of Genocide, or the "Genocide Convention" as it is generally known.

The Executive Branch has now completed an extensive review of the Genocide Convention, including the questions raised in the past in connection with its consideration by the Senate of the United States. We undertook this review to examine anew whether ratification of this Convention continued to be in the best interest of the United States. I am pleased to inform you that having completed that review, this Administration believes that no legal impediment exists to the ratification of this important Convention, subject to the three understandings and one declaration which the Committee on Foreign Relations itself reported in 1976.

The Genocide Convention can be briefly summarized: The Convention defines the act of genocide, confirms that it is a crime under international law, obliges States which are Parties to enact legislation to make genocide a crime under national law, and specifies that the Parties pledge themselves to grant extradition in accordance with their laws and treaties in force. For the purpose of extradition, genocide shall not be considered a political offense. The Convention also provides that disputes between Parties relating to the Convention's interpretation, application or fulfillment shall be submitted to the International Court of Justice.

The main thrust of the Convention is to require Parties to outlaw genocide within the structure of their own legal systems. Thus, in addition to the Senate's providing advice and consent to its ratification, the Congress must enact legislation which would add to the criminal code a new crime called genocide and set forth criminal penalties for its commission.

Articles II and III of the Convention provide the contours of what such legislation would contain. Article II defines genocide to be any one of five types of acts committed with "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." The five types of acts are: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group. Article III of the Convention provides for the punishment of genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide and complicity in the commission of genocide.

Since its submission to the Senate by President Truman in 1949, the Genocide Convention has been considered by this Committee on at least seven occasions. The Committee has heard from distinguished scholars concerning whether significant legal impediments existed to ratification of this Convention. I will not today attempt to restate comprehensively these legal discussions. Instead I would like to discuss briefly two major legal issues which have previously been considered in testimony before this Committee.

It has been argued that genocide is not a proper subject for treaty making and is essentially a subject within the domestic jurisdiction of sovereign states. The United States is already party to numerous multilateral treaties which deal with diverse matters of concern to the international community, including in the human rights area treaties on slavery and refugees. Recent actions by the Senate, for example in giving advice and consent to the Convention on the Taking of Hostages, reflect the wide range of legitimate topics for international concern. In the present case, 96 countries by ratifying or acceeding to the Genocide Convention have indicated their belief that the subject of genocide is a proper concern of nations. International human rights are properly a subject of international concern. Accordingly, I believe the Genocide Convention is clearly within the treaty making powers of the United States.

It has also been argued that ratification of the Genocide Convention might force the United States at some future date to extradite Americans for trial abroad on trumped up charges of genocide. I want to allay any apprehensions on this point. The careful definition of genocide contained in the Convention, as clarified by the first two proposed understandings, and the procedural safeguards built into our extradition process will prevent this from occurring.

The definition of genocide in the Convention requires the presence of specific elements, in particular a specific intent and the commission of one or more defined overt acts.

Under the Convention, genocide requires for its commission the specific "intent to destroy the group in whole or in part, as such." The Administration supports the

clarification in the first understanding proposed by the Foreign Relations Committee in 1976 to the effect that this intention must be one to destroy the group by specified acts "in such manner as to affect a substantial part of the group concerned." This distinguishes the international crime of genocide—i.e. acts taken with intent to destroy groups—from the domestic crime of homicide—i.e. acts taken with the intent to destroy individuals. The second understanding proposed by the Committee and supported by the Administration specifies that "mental harm" means permanent impairment of mental faculties.

Under Article VII of the Convention the Parties pledge to grant extradition of persons charged with genocide "in accordance with their laws and treaties in force." Thus the United States would not be required to surrender an individual to any nation if, for example, that country fails to make a showing of probable cause or the United States finds the request for extradition to have been politically motivated. Under the terms of the Convention, once it has entered into force, there shall, however, be no defense to extradition on the grounds that the crime was a "political" one.

It should be emphasized that the Convention does not purport to be an extradition treaty itself. Furthermore, no person could be extradited from the United States for trial in a foreign country on a genocide charge unless we have a bilateral extradition treaty with that country making genocide an extraditable offense. No U.S. treaty presently in force does so. Six recent treaties (those with Costa Rica, Ireland, Italy, Jamaica, Sweden, and Thailand) to which the Senate recently gave advice and consent, but which have not entered into force, contain a general formula under which extradition would lie for offenses that are crimes punishable in both the United States and the other country by more than a specified period of imprisonment. For all but these six treaties, amendment of United States bilateral extradition treaties to include genocide will be required before they would afford a basis for extradition as a result of United States ratification of the Genocide Convention. Furthermore, no existing bilateral extradition treaty, whether the older type which lists specific crimes or the more recent type containing the formula, will cover genocide unless and until the United States Congress adopts the necessary implementation legislation, to execute this non-self-executing treaty. In this connection, the proposed declaration states that the United States will not deposit its instrument of ratification to the Convention until after such legislation has been enacted. Thus in every case further Congressional action would be required before genocide would become an extraditable offense. This would include passage of implementing legislation and, in addition, in all but the six extradition treaties I mentioned, Senate approval of amendments to treaties.

I should also note that our extradition treaties contain several procedural safeguards which apply regardless of the extraditable offense. For example, under each bilateral extradition treaty the state requesting extradition must produce sufficient evidence to persuade both a U.S. court and the Secretary of State that there is probable cause to believe the person sought committed the offense with which he is charged.

Finally, the negotiating history of the Convention, confirmed in the third proposed understanding, makes clear that trial for genocide may also occur in the country of which the defendant is a national. In this regard, the implementing legislation should enable U.S. authorities to prosecute a genocide offense committed by United States nationals outside the United States as an alternative to responding affirmatively to a request for extradition. As previously noted, as the 1976 Foreign Relations Committee declaration supported by the Administration makes clear, the United States will not deposit the instrument of ratification to the Convention until after such implementing legislation is enacted.

I have not attempted to canvas in detail the other legal issues which have been debated before the Committee in the past during its consideration of the Genocide Convention. Previous discussions before this Committee by representatives of the Office of the Legal Adviser and the Department of Justice have already addressed these questions comprehensively.

This concludes my statement. I would be pleased to answer any questions you may have after Mr. Olson has completed his statement.

The CHAIRMAN. Thank you very much, Mr. Robinson.

Mr. Olson.

STATEMENT OF THEODORE B. OLSON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. OLSON. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, I will be very brief and very general. As Senator Pell noted, this Convention has been considered by this committee on a number of occasions before, and indeed has been reported out of this committee on a number of occasions.

There is a great deal of testimony and analysis on the record already, and I will attempt not to burden the record with anything further except in a very brief way.

Thank you for affording me the opportunity to appear before you today on behalf of the Department of Justice. On September 5, 1984, President Reagan asked the Senate to give its advice and consent to the ratification of the Genocide Convention. Although the Department of State has been the primary agency working for U.S. adoption of the convention since its inception, the Department of Justice, both in past administrations and in this administration, has reviewed the convention carefully with regard to its constitutional and criminal law aspects.

The Attorney General has recently expressed to the President his legal opinion that there are currently no domestic legal obstacles to ratification of the convention. He has authorized me to reaffirm his opinion today.

Legal discussions and issues, of course, are by no means over or settled because there is implementing legislation which must be enacted by this body and the House of Representatives.

Shortly after President Truman initially transmitted the Genocide Convention to the Senate for its advice and consent in June 1949, then-Solicitor General Philip Perlman provided a detailed and scholarly statement to a subcommittee of this committee regarding the constitutional and other legal questions surrounding the Genocide Convention. Commenting on that statement more than 20 years later during his testimony before a subcommittee of this committee, then-Assistant Attorney General William Rehnquist, one of my predecessors, endorsed and expanded on Solicitor General Perlman's testimony with the following statement:

> In 1950, some of the questions concerning Federal jurisdiction and the treaty power [surrounding the Genocide Convention] were considered somewhat novel. However, developments in the intervening years—the extensive use of the treaty power and the growth of Federal criminal jurisdiction—have, it seems, illuminated both of these areas to the point where I believe I can safely say that the questions before the committee and the Senate are more matters of policy than questions of legal power.

In our view, the legal correctness of this statement, made more than 14 years ago, is even more apparent today. Since Assistant Attorney General Rehnquist made his statement in 1970, this committee has favorably reported on this convention four times, in 1970, 1971, 1973, and 1976. On each occasion, the committee has urged the Senate to give its advice and consent to ratification of the convention along with the three understandings and one declaration that this administration, currently favors.

Since 1976, the American Bar Association has similarly urged that the United States ratify the convention conditioned on the adoption of this package of three understandings and one declaration. And, I was visited by representatives of the American Bar Association this summer, once again reaffirming that position.

It is our view that there are currently no domestic legal obstacles to the ratification of the convention, particularly if the Senate were to give its advice and consent to ratification conditioned on the adoption of this historically approved package of understandings and a declaration.

Thank you, Mr. Chairman.

[Mr. Olson's prepared statement follows:]

PREPARED STATEMENT OF THEODORE B. OLSON

Mr. Chairman and Members of the Committee: Thank you for affording me the opportunity to appear before you today on behalf of the Department of Justice. On September 5, 1984, President Reagan asked the Senate to give its advice and consent to the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, known popularly as the genocide Convention. Although the Department of State has been the primary agency working for United States' adoption of the Convention since its inception, the Department of Justice both in past Administrations and in this Administration has reviewed the Convention carefully with regard to both its constitutional and its criminal law aspects. The Attorney General has recently expressed to the President his legal opinion that there are currently no domestic legal obstacles to ratification of the Convention.

As Assistant Attorney General in charge of the Office of Legal Counsel, I have participated in the deliberations which led to the Attorney General's decision. He has authorized me to reaffirm his opinion today.

Shortly after President Truman initially transmitted the Genocide Convention to the Senate for its advice and consent in June 1949, then-Solicitor General Philip B. Perlman provided a detailed and scholarly statement to a subcommittee of this Committee regarding the constitutional and other legal questions surrounding the genocide Convention.[1] Commenting on that statement more than 20 years later during his testimony before a subcommittee of this Committee, then-Assistant Attorney General William. H. Rehnquist, one of my predecessors, endorsed and expanded on Solicitor General Perlman's testimony with the following statement:

"In 1950 some of the questions concerning Federal jurisdiction and the treaty power [surrounding the Genocide Convention] were considered somewhat novel. However, developments in the intervening years—the extensive use of the treaty power and the growth of Federal criminal jurisdiction—have, it seems, illuminated both these areas to the point where I believe I can safely say that the questions before the Committee and the Senate are more matters of policy than questions of legal power."[2]

In our view, the legal correctness of this statement, made more than 14 years ago, is even more apparent today. Since Assistant Attorney General Rehnquist made his statement in 1970, this Committee has favorably reported on this Convention four times, in 1970, 1971, 1973, and 1976. On each occasion, the Committee has urged that the Senate give its advice and consent to ratification of the Convention along with the three understandings and one declaration that the Administration currently favors.[3] Since 1976, the American Bar Association has similarly urged that the United States ratify the Convention conditioned on the adoption of this "package" of three understandings and one declaration. It is our view that there are currently no domestic legal obstacles to the ratification of the Convention, particularly if the Senate were to give its advice and consent to ratification conditioned on the adop-

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[1] See Statement of Philip B. Perlman, Solicitor General of the United States, Hearings Before a Subcommittee of the Senate Committee on Foreign Relations on Ex. O. 81st Cong., 2d sess. at 22-53 (Jan. 23, 1950).

[2] Statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Hearings Before a Subcommittee of the Senate Committee on Foreign Relations on Ex. O, 91st Cong., 2d sess. at 147 (Apr. 27, 1970).

[3] See Ex. Rept. No. 25, 91st Cong., 2d Sess. 1-2 (1970); S. Ex. Rept. No. 6, 92d Cong., 1st Sess. 1-2 (1971); S. Ex. Rept. No. 5, 93d Cong., 1st Sess. 1-2 (1973); S. Ex. Rept. No. 23, 94th Cong., 2d Sess. 1-2 (1976).

tion of this historically approved package of understandings and a declaration. I believe that the other witnesses appearing before you today in suport of this treaty fully share this view.

I am now at your service to answer any remaining questions that you may have.

The CHAIRMAN. Thank you very much. Senator Pell and I will alternate in questioning you, and I will let the panel decide among yourselves which one of you would most appropriately answer, and any of you wishing to expand or clarify your particular position or departmental position may do so.

I would like first, because Senator Sam Ervin has been mentioned by both Senator Helms and myself, to make clear on the record where he stood on Friday, May 22, 1970, when he appeared before this committee. He said in his opening statement:

Gentlemen, I welcome this opportunity to appear before the subcommittee and to urge the subcommittee to recommend to the full committee that the so-called Genocide Convention not be reported to the Senate for consideration.

Senator Javits who was presiding at that time, or who was on the panel at that time, said:

I didn't get that. Not be reported?

Senator ERVIN. Yes. It would be extremely unwise for the Senate of the United States to ratify the Genocide Convention. This is particularly true at a time when it is manifest that a substantial part of the American people wish to contract rather than expand their international obligations.

Do any of you know whether or not—and I am sorry Senator Helms is not here—whether Senator Ervin has modified his position since that point, or is that still the position he would take today from the writings that you have seen of his or statements he has made?

I have not kept current on all of his up-to-date thoughts on it.

Mr. OLSON. I will try to answer that, Mr. Chairman. I have not read anything by former Senator Ervin on the subject, though I did speak with Senator Helms this morning before this hearing. Senator Helms indicated to me that Senator Ervin would support his position with respect to the two declarations that Senator Helms has offered. I have not read anything else.

Mr. ROBINSON. I have not either, Mr. Chairman.

The CHAIRMAN. All right. We will keep the record open for a few days in the event that Senator Helms would like to update, or Senator Ervin would like to insert in the record at this point, any of his own particular viewpoints on the treaty, to update this committee as to what his judgment was because we all—while we have not always agreed with Senator Ervin—have always had a profound respect for his understanding of the Constitution.

[The following material was subsequently received for the record:]

SAM J. ERVIN, JR.,
Morganton, NC, September 12, 1984.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR CHUCK: Please forsake the Genocide Treaty. It contains the greatest foolishness ever presented to the Senate in the form of a treaty.

I enclose a speech I made on this subject some years ago. This speech explains what a fool proposition the Genocide Treaty is.

With all good wishes, I am

Sincerely yours,

SAM J. ERVIN, JR.,
Former U.S. Senator.

Enclosure.

[From the Congressional Record, May 25, 1970]

THE GENOCIDE CONVENTION—WHY THE SENATE SHOULD REFUSE TO RATIFY IT

Mr. ERVIN. Mr. President, it would be extremely unwise for the Senate of the United States to ratify the Genocide Convention. This is particularly true at a time when it is manifest that a substantial part of the American people wish to contract rather than expand their international obligations.

HISTORY OF THE GENOCIDE CONVENTION

During the 1940's activists connected with the United Nations engaged in a strenuous effort to establish by treaties laws to supersede domestic laws of nations throughout the earth. The Genocide Convention represents one of these efforts. It originated in a resolution of the United Nations condemning genocide as a crime whether "committed on religious, racial, political, or any other grounds." When reduced to its final form it excluded genocide committed on "political" grounds because some of the parties to it did not wish to surrender even nominally their right to exterminate political groups hostile to their rulers. Under its provisions, individuals as well as persons exercising governmental power would be subject to trial and punishment for offenses which have always been regarded as matters falling within the domestic jurisdiction of the various nations.

The Genocide Convention was adopted by the General Assembly of the United Nations on December 10, 1948, and was submitted by President Harry S. Truman to the Senate for its consideration on June 16, 1949. The Senate Foreign Relations Committee appointed a subcommittee composed of very able Senators, who conducted hearings in January and February 1950, and reported to the full committee that the United States should not ratify the convention in any event unless the Senate adopted four substantial understandings and one substantial declaration. Since this report was made, the Senate Foreign Relations Committee and the Senate itself by inaction have refused to ratify this convention.

In contrast to the attitude represented by this inaction during the preceding 20 years, the Senate Foreign Relations Committee has apparently revived the question of ratification during the past few months, notwithstanding the fact that there has been no change of circumstances which would make what was unwise in 1950 wise in 1970.

The only argument now advanced for ratification of this convention is that it would improve the image of the United States in the eyes of Russia and other totalitarian parties to the convention, which strange to say have repudiated by understanding and reservations many of the provisions of the convention.

For example, these nations refuse to be bound by article IX which subjects their actions under it to the jurisdiction of the International Court of Justice. Some of the proponents of ratification by the Senate advance the rather strange argument that the United States can safely ratify the convention because there is no effective way to enforce its provisions against the United States if the United States refuses to abide by them. I cannot buy this argument because I think that any nation which makes a contract in the form of a treaty should accept its obligations even in the event such obligations prove to be contrary to its own interest. Otherwise, why make treaties.

Before discussing the obligations which the United States would assume as the result of Senate ratification of the Genocide Convention, I wish to call attention to its salient provisions.

PROVISIONS OF THE GENOCIDE CONVENTION

By the Genocide Convention or treaty the contracting parties affirm in article I "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Articles II and III of the convention read:

"Article II

"In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

"(a) Killing members of the group;

"(b) Causing serious bodily or mental harm to members of the group;

"(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(d) Imposing measures intended to prevent births within the group;

"(e) Forcibly transferring children of the group to another group.

"Article III

"The following acts shall be punishable:

"(a) Genocide;

"(b) Conspiracy to commit genocide;

"(c) Direct and public incitement to commit genocide;

"(d) Attempt to commit genocide;

"(e) Complicity in genocide."

Article IV specifies that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the convention and to provide effective penalties "for persons guilty of genocide or of any of the other acts enumerated in article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the nation in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

Article VII provides that the parties to the treaty pledge themselves in genocide cases to grant extradition in accordance with their laws and treaties. Article VIII provides that "any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

Article IX provides that "disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention—shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

This brings me to the considerations which ought to deter the Senate from ratifying the Genocide Convention. Time and space compel me to limit my statement to only the most substantial of them.

CONVENTION DISTORTS CONCEPT OF GENOCIDE

First, if the Senate should ratify the Genocide Convention, the United States would be obligated by it to prosecute and punish public officials and private citizens of our country for acts alien to the concept embodied in the term genocide.

The definition of genocide appears in article II which states that the term genocide embraces five specified acts "committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such." The convention definition of genocide is inconsistent with the real meaning of the term, which is "the systematic, planned annihilation of a racial, political, or cultural group." The word annihilation clearly contemplates the complete destruction or the complete wiping out of the designated group.

Yet, the convention definition covers the destruction either in whole or in part of members of a group embraced by it. This means that a public official or a private individual is to be subject to prosecution and punishment for genocide if he intentionally destroys a single member of one of the specified groups.

When it considered this convention in 1950, the subcommittee of the Committee on Foreign Relations took note of the fact that the convention distorts and perverts the entire concept embraced in the word "genocide," and for that reason stated that the Senate ought not to consider ratification of the convention unless it announced this understanding of its meaning:

"That the United States Government understands and construes the crime of genocide, which is undertakes to punish in accordance with this convention, to mean the commission of any of the acts enumerated in article II of the convention,

with the intent to destroy an entire national, ethical, racial, or religious group within the territory of the United States, in such manner as to effect a substantial portion of the group concerned.

This distortion and perversion of the plain concept embraced in the word "genocide" represents an effort on the part of the drafters of the convention to make punishable either in the courts of an adherent to the treaty or in an international tribunal to be established under the terms of the treaty, all of the acts enumerated in articles II and III of the convention.

Since an intent to destroy a single person belonging to one of the four designated groups would subject an official or individual to punishment, the treaty would make virtually every person in any nation adhering to it a potential victim of genocide as the meaning of that term is distorted and perverted by the convention. This is true simply because virtually every person on earth belongs to one or more of the four groups designated.

This observation is made exceedingly plain by the fact that an ethnical group is a "social group within a cultural and social system that claims or is accorded special status on the basis of complex, often variable traits including religious, linguistic, ancestral, or physical characteristics."

DRASTIC IMPACT OF CONVENTION ON OUR SYSTEM OF GOVERNMENT

Second. Article II, section 2 of the Constitution provides that "the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article VI of the Constitution provides that "the Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If the Senate should ratify the Genocide Convention, these constitutional provisions would automatically make the Convention the law of the land, put all of its self-executing provisions into immediate effect as such, and impose upon the United States the obligation to take whatever steps are necessary to make its non-self-executing provisions effective. This means that the provisions of the Genocide Convention would immediately supersede all State laws and practices inconsistent with them, and would nullify all provisions of all acts of Congress and prior treaties of the United States inconsistent with them.

While Congress could repeal provisions of the Genocide Convention by future legislation, the States would be bound by them as long as the Convention remained in effect. Moreover, the Genocide Convention would immediately require and authorize Congress to enact legislation implementing its provisions, even though such legislation were beyond the power of Congress in the absence of the Convention, and even though such legislation would deprive the States of the power to prosecute and punish in their courts acts condemned by articles II and III of the Convention.

Surely, the Senate should pause and ponder what the impact of the ratification of the Genocide Convention would have on our system of government.

It is noted that virtually all the other nations of the earth have no constitutional or legal principle similar to article VI of the Constitution of the United States making treaties "the supreme law of the land," and that for this reason treaties do not take effect as internal law in other nations unless their legislative branches of government adopt laws subsequent to their ratification giving them such effect.

Third. One of the most drastic impacts the ratification of the Genocide Convention would have upon our system to government is in the criminal field. If the Senate should ratify the Genocide Convention, the duty and the power to prosecute and punish criminal homicides, assaults and batteries, and kidnapings covered by categories (a), (b) and (e) of article II of the convention would be forthwith transferred from the states which have always had such duty and power in respect to these crimes to the Federal Government. To make this transfer of justification workable, Congress would be required to enact new laws laying down rules of procedure to govern the trial of these newly created Federal and international crimes. Pending the passage of such laws, our country would experience utter confusion in the administration of criminal justice in respect to homicides, assaults and batteries, and kidnapings.

Proponents of ratification may argue that many homicides, assaults and batteries, and kidnapings would not fall within the definition of genocide. This contention accentuates rather than minimizes the folly of ratifying the Genocide Convention.

As has been pointed out, virtually every person in America falls within one or more of the four groups designated in the Genocide Convention, and any offense denounced by the Genocide Convention against any one of them would ostensibly fall within the scope of the convention. The jurisdiction of the Federal courts under the Genocide Convention would not depend upon what the jury found in particular cases. It would depend upon the allegations made in the indictments or informations charging the offenses.

Consequently, we can reasonably expect that demands will be made that every homicide, every assault and battery inflicting serious injury, and every kidnaping shall be tried in a Federal court, or in an international court to be established pursuant to the convention. What this will do to increase the congestion in the already overburdened Federal courts of our land beggars description.

In the absence of ratification of the convention, demands have already been made that the United Nations investigate the slaying of Black Panthers by police officers on the ground that their slaying constituted genocide under article II(a), and that the United Nations investigate the action of the legislature of one State in respect to welfare benefits on the ground that the legislative action constituted genocide under article II(c).

I respectfully suggest that the Senate should pause and ponder whether it is desirable to ratify a convention which would necessitate a fundamental alteration in the way in which criminal justice has been administered in the United States ever since our country come into existence as a free republic.

When the subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it clearly recognized that ratification of the convention would play havoc with our system of administering criminal justice in respect to domestic crimes made Federal and international crimes by articles II and III, and for this reason decided that the Senate should not ratify the convention in any event without making this declaration:

In giving its advice and consent to the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, the Senate of the United States of America does so considering this to be an exercise of the authority of the Federal Government to define and punish offenses against the law of nations, expressly conferred by article I, section 8, clause 10 of the United States Constitution, and consequently, the traditional jurisdiction of the several States of the Union with regard to crime is in no way abridged.

Confusion in the administration of criminal justice in respect to domestic crimes made Federal or international crimes by the Genocide Convention would not disappear with the enactment of legislation by Congress implementing the convention. The validity of this observation may be illustrated by taking a single crime, that of unlawful homicide. Under the Constitution of the United States, Congress does not have the power to make unlawful homicides generally Federal or international crimes. If ratified by the Senate, the Genocide Convention would give Congress this power in respect to homicides constituting genocide under the definition contained in the convention. Jurisdiction to prosecute and punish other unlawful homicides would remain in the State.

The only distinction between unlawful homicides remaining in the jurisdiction of the States and unlawful homicides transferred by the Genocide Convention and Acts of Congress implementing it to the Federal Government would depend upon whether the homicide is committed with genocidal intent. As a consequence, every unlawful homicide would apparently be within the jurisdiction of both the Federal and the State government insofar, as the external circumstances of the slaying are concerned.

Hence, either State or Federal courts could assert jurisdiction in respect to virtually all homicides, and an acquittal of the charge in one court would not bar a second prosecution based on the same facts in the other court. This being true, a person could be twice placed in jeopardy for the same offense.

The power of a Federal court to try a person for a homicide on the ground that it constitutes genocide depends upon the allegations of the indictment and not upon the ultimate finding of the jury. On a trial in the Federal court, the jury would be compelled to acquit the accused of genocide unless it found that he acted with the requisite genicodal intent, no matter how atrocious the circumstances attending the homicide otherwise might be. In such a case, the accused would go unwhipped of justice unless he was placed upon trial a second time in a State court.

The Senate should be slow to ratify any convention which would make such confusion in the administration of criminal justice in cases of this kind.

MEANING OF CONVENTION SHROUDED IN UNCERTAINTY

Fourth. If the Senate should ratify the Genocide Convention, it would place obligations upon the United States to prosecute and punish as genocides acts whose nature the convention fails to disclose and to take steps whose nature the convention fails to reveal.

If the convention is ratified, article II(b) would impose upon the United States the duty to prevent and to prosecute and punish public officials and individuals who cause "mental harm to members" of any one of the four groups named in the convention. What mental harm means in this context is totally incomprehensible, and what psychological acts or omissions are made punishable in this context are left in obsurity. When the Subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it reached the conclusion that the Senate ought not to ratify the Genocide Convention in any event unless it expressed this understanding:

"That the United States Government understands and construes the words "mental harm" appearing in article II of this Convention to mean permanent physical injury to mental faculties."

If the convention is ratified, article II(c) would impose upon the United States the duty to prevent and to prosecute and punish anyone who deliberately inflicts "on the group conditions of life calculated to bring about its physical destruction in whole or in part." What this means, no mind can fathom. Does it mean that a State or county official who refuses to give to a member of one of the four groups designated in the convention the amount of welfare benefits deemed desirable is to be punished or prosecuted for genocide? Does it mean that the Court of International Justice shall have power under article IX to adjudge that Congress or a State legislature which does not make available to members of one of the four groups what the Court deems to be adequate welfare benefits has violated the convention?

If the convention is ratified, article III(c) makes any official or individual in our land punishable for "direct and public incitement to commit genocide." What does this mean? Does it mean that the convention undertakes to make a Senator or a Congressman punishable for genocide if he makes a speech outside of the Chamber of his respective House in which he justifies the action of Arabs in killing Jews, or the action of Jews killing Arabs? Does it undertake to deprive public officials and citizens of America of the right to freedom of speech with respect to matters falling within the terms of the Genocide Convention?

If anyone believes that the first amendment invalidates my apprehension on this score, let him read and ponder *Fox* v. *Washington*, 236 U.S. 273, and *Feiner* v. *New York*, 340 U.S. 315, as well as the majority and dissenting opinions in *Terminiello* v. *Chicago*, 337 U.S. 1.

If the convention is ratified, public offficials and private citizens of our land will be subject to punishment in Federal courts or possibly in international penal tribunals to be established under article VI if they are guilty of the undefined offense designated as "complicity in genocide." What is "complicity in genocide?" The convention does not say.

When the subcommittee of the Senate Foreign Relations Committee considered the Convention in 1950, it recognized the vagueness and uncertainty of this proposed Federal and international crime, and recommended that the Senate should not ratify this Convention in any event without stating the following reservation:

"That the United States Government understands and construes the words 'complicity in genocide appearing in article II of this Convention to mean particpation before and after the fact and aiding and abetting in the commission of the crime of genocide."

If the convention is ratified, article II would impose upon the United States the obligation to prevent and to punish as a crime under international law any act of genocide "whether committed in time of peace or in time of war," and article VIII would authorize any party to the convention to call on the United Nations to take such action against the United States under the charter of the United Nations it considers "appropriate for the prevention and suppression of acts of genocide, or any of the other acts enumerated in article III" occurring or likely to occur anywhere in the United States.

What actual obilgations does article I impose upon the United States with respect to events occurring either in peace or in war in lands beyond the seas? Does it require the United States to go to war to prevent one nation from killing the nationals of another nation? The Convention does not say, but article IX places the power to determine this question in the International Court of Justice.

Does artcile VIII imply that the United States agrees that the United Nations is to investigate or take action concerning the acts of public officials and individuals occurring within the borders of the United States? The convention does not say, but article IX leaves this determination to the International Court of Justice.

Able lawyers have expressed the fear that article VI imposes upon the Congress an implied commitment to support the creation of an international court for trials of American citizens for genocide. I find myself in complete harmony with their opposition to subjecting our citizens and other persons within our territorial jurisdiction to trail, conviction, and sentence for acts of genocide committed in the United States by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime.

CONVENTION MAKES SOLDIERS PUNISHABLE FOR SERVING THEIR COUNTRY IN COMBAT

Fifth. If the Senate should ratify the Genocide Convention, it would make American soldiers fighting under the flag of their country in foreign lands triable and punishable in foreign courts—even in courts of our warring enemy—for killing and seriously wounding members of the military forces of our warring enemy.

This is made indisputable by article I which provides that genocide is punishable under the convention whether it is committed in time of peace or in time of war, and by the fact that it contains no provision exempting soldiers engaged in combat from the coverage of the provisions of the convention. When soldiers kill or seriously wound members of a detachment of the military forces of a hostile nation, they certaintly do so with intent to destroy, in whole or in part, a national group as such. Hence, their acts in combat fall clearly within the purview of the convention. In such cases, they are triable and punishable under article VI in the courts of the nation in whose territory their acts are committed, or in such an international penal tribunal "as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

These things being true, American soldiers killing or seriously wounding North Vienamese soldiers or members of the Vietcong, or South Vietnamese civilians in South Vietnam, are triable and punishable in courts sitting in South Vietnam, and American aviators who kill North Vietnamese soldiers or civilians in bombing raids upon targets in North Vietnam, and who fall into the hands of the North Vietnamese, are triable and punishable in the courts of North Vietnam. No sophistry can erase this obvious interpretation of the Genocide Convention.

CONVENTION SUBORDINATES THE AMERICAN GOVERNMENT TO THE WORLD COURT

Sixth. If the Senate should ratify the Genocide Convention, article I would impose upon the President, as the Chief Executive of the United States, the duty to enforce both the provisions of the convention and any acts of Congress implementing them as the supreme law of the land.

Article V would obligate the Congress to enact legislation to give effect to all the provisions of the convention, and to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III, and article VI would obligate the Supreme Court of the United States and all inferior Federal courts created by Congress to interpret and apply all of the provisions of the convention and of the acts of Congress implementing it to cases coming before them under the terms of the convention and the acts of Congress implementing such terms.

Seventh. If the Senate should ratify the Genocide Convention, it would bring into play article IX which provides that disputes between the parties to the convention relating to the "interpretation, application, or fulfillment" of the convention "shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Under this article the International Court of Justice would be empowered to decree that the President of the United States, as Chief Executive Officer of the United States, had interpreted and applied the provisions of the convention incorrectly and by so doing impose upon the President of the United States its notions as to how the convention should be interpreted and enforced; the power to adjudge that legislation enacted by Congress to give effect to the provisions of the convention was insufficient to fulfill the obligations imposed upon it by the convention; and the power to adjudge that the Supreme Court of the United States and Federal courts inferior to it had interpreted and applied the provisions of the convention incorrectly and by so doing require these tribunals to apply its notions as to how such provisions should be interpreted and applied to future cases coming before them.

When their attention is called to the drastic powers which the ratification of the Genocide Convention would bestow upon the International Court of Justice in respect to the President, the Congress, and the Supreme Court and other inferior Federal courts, the proponents of ratification assert that these agencies of the Government of the United States do not have to obey the rulings of the International Court of Justice if they deem that such rulings infringe upon the fundamental sovereignty of the United States. In so doing they ignore the solemn obligation assumed by the United States under article 94 of the charter of the United Nations which reads as follows:

"Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

The charter of the United Nations clearly contemplates that the United Nations will not interfere in the domestic affairs of any nation. The Genocide Convention goes a bow shot beyond the charter of the United Nations. it undertakes to regulate certain domestic affairs of the parties to it by converting what have always been domestic crimes into international crimes, and confers upon the International Court of Justice the vast powers set forth in article IX.

Consequently, if the Senate should ratify it, the Genocide Convention would render the Connally reservation, which was designed to prevent the International Court of Justice from exercising jurisdiction over any domestic affair of the United States, inapplicable to any of the matters covered by the convention, and would nullify the Vandenberg reservation to the jurisdiction of the International Court of Justice which stipulates that American acceptance of compulsory jurisdiction of the Court shall not apply to "disputes arising under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court, or the United States specially agrees to jurisdiction."

What I have said does not militate against the good intentions of those who drafted the Genocide Convention, or those who favor its ratification. All of us are opposed to the systematic, planned annihilation of any national, ethnical, racial, or religious group. The existing laws of the United States and its several States are adequate to punish all of the physical acts of violence denounced by the Genocide Convention. Hence the Senate does not need to ratify the Genocide Convention in order to make these acts punishable as crimes if committed within the borders of our land.

But the Senate should not permit itself to be persuaded by the good intentions of the proponents of ratification to ratify a convention which would have such a tragic impact upon the system of government which has always existed in our land, and which for the first time in our history undertakes to make undefined psychological harms inflicted in some undefined manner Federal and international crimes.

The American Bar Association has twice urged the Senate to reject the Genocide Convention—once in 1949 and again in 1970.

In closing, I urge every Senator to read the booklet entitled "The Convention on the Prevention and Punishment of the Crime of Genocide" prepared by 36 of the most distinguished and patriotic lawyers of America.

When this convention was originally submitted to the Senate for ratification or rejection, one of America's ablest jurists, Orie L. Phillips, chief judge of the U.S. Court of Appeals for the 10th Circuit, wrote an article entitled "The Genocide Convention: Its Effect on Our Legal System," which was published in the American Bar Association Journal for August 1949. I ask unanimous consent that the article be printed in the RECORD. I commend it to all Senators for their reading:

THE GENOCIDE CONVENTION: ITS EFFECT ON OUR LEGAL SYSTEM

(By Orie L. Phillips)

(NOTE.—In this article, Judge Phillips makes a concise, precise, analysis of the terms of the proposed Convention on the Prevention and Punishment of Genocide, and then discusses the effect of the Convention should it be consented to by the Senate. He points out that under the Constitution, a treaty is the supreme law of the land, superior to any state constitution or statute, and any existing federal statute, and that once a treaty has been approved by the Senate no further action is necessary to make it part of the municipal law of every state, binding upon individuals. While recognizing our international responsibilities, Judge Phillips questions the wisdom of this Convention and offers a suggestion that will carry out our international obligations without subjecting individual Americans to trial and conviction by a court that may not operate under the safeguards to an accused accorded by our legal system.)

On June 16, 1949, the President transmitted to the Senate the Convention on Genocide with the request that the Senate give its advice and consent to its ratification.

By this Treaty the contracting parties confirm that genocide is, "A crime under international law which they undertake to prevent and punish."

Articles II and III of the Convention read:

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties "for persons guilty of genocide or any of the other acts enumerated in Article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in Article II shall be tried by a competent tribunal of the state" in which the act was committed, or by "such international penal tribunal as may have jurisdiction with respect to such contracting parties which shall have accepted its jurisdiction."

Article IX provides that disputes between the contracting parties relating to the "interpretation, application or fulfillment of the present convention," shall be submitted to the International Court of Justice at the request of any party to the dispute.

Thus, it will be seen that it is proposed by the action of the President, consented to by two/thirds of the Senators present [1] when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their punishment and for the trial of persons accused thereof either in our domestic courts or in an international tribunal.

Treaty-making power is reviewed

It would seem appropriate, therefore, to review the treaty-making power.

Section 2 of Article II of the United States Constitution authorizes the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

The power is not one granted by the states. Neither did the powers of external sovereignty depend on the affirmative grants of the Constitution. If they had not been mentioned in the Constitution, they would have vested in the Federal Government as necessary concomitants of nationality. They embrace all the powers of government necessary to maintain an effective control of international relations.[2]

". . . the external powers of the United States are to be exercised without regard to state laws or policies."[3]

". . . the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.' "[4]

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[1] See Art. II, § 2 United States Constitution.

[2] *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315–318.

[3] *United States* v. *Belmont*, 301 U.S. 324, 331.

[4] *United States* v. *Pink*, 315 U.S. 203, 232.

The treaty-making power is not limited by any express provision in the Constitution. But it does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our Government and the relation between the states and the United States.[5]

The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may be made which affect rights under the control of the states.[6]

Treaty is equivalent to statute

A treaty, entered into in accordance with constitutional requirements, to the extent that it is self-executing, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an Act of Congress. In addition to being an international contract, it becomes municipal law of the United States and of each of the states, and the judges of every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.[7]

In the event of a conflict between a treaty made in accordance with constitutional requirements and the provisions of a state constitution or a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control.[8]

But, a treaty may be abrogated by the enactment of a subsequent federal statute which is clearly inconsistent therewith.[9]

Thus, it will be seen that it is proposed that we set out on a course, under a power without express limitation and of broad scope, to enact domestic criminal law, without any concurrence by the House of Representatives, the body traditionally regarded as closest to the people.

Moreover, if the offenses involved should be regarded as international in character by Section 8 of Article I of the United States Constitution, Congress has the power "to define and punish . . . offenses against the law of nations."

Convention would become supreme law of land

Since the Convention in most respects is self-executing, in those respects, on ratification, it would become the supreme law of the land. That would not be true as to any other contracting party except France and a few other states. Even if non-self-executing, the obligation to implement the Treaty by legislation is as binding as the Treaty itself.

It is one of our fundamental concepts that a legislative body, in the exercise of its power to declare what constitutes a crime, must define it so as to inform persons subject thereto, with reasonable precision, what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [10]

Do the definitions in Articles II and III of the Convention meet that test?

What is a part of a national, ethnical, racial or religious group—one member, two members, how many?

If an act was done with intent to destroy two members of a group, although actuated by no malice toward the group as such, would that be genocide?

Would it not be more accurate and desirable if the prerequisite intent was defined as an act committed with intent to injure one of the enumerated groups as such, so as to make it clear the act must be directed toward the group as such and not merely at an individual member or members thereof?

What is meant by mental harm?

Does not complicity mean the act of an accessory, or to aid, abet, assist, or incite genocide?

A person accused of an offense defined by the Convention, if tried by an international penal tribunal, would not be surrounded by the safeguards we accord persons charged with domestic crimes.

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[5] *Asakura* v. *Seattle*, 265 U.S. 332, 341; *Holden* v. *Joy*, 84 U.S. 211, 243; *Geofroy* v. *Riggs*, 133, U.S. 258, 267.

[6] *Missouri* v. *Holland*, 252 U.S. 416, 432.

[7] See *Valentine* v. *Neidecker*, 299 U.S. 5, 10; *Whitney* v. *Robertson*, 124 U.S. 190, 194.

[8] *Santovincenzo* v. *Egan*, 248 U.S. 30, 40; *Nielsen* v. *Johnson*, 279 U.S. 47, 52.

[9] *Whitney* v. *Robertson*, 124 U.S. 190, 195; *Botiller* v. *Dominguez*, 130 U.S. 238, 247; 52 *Am. Jur. Treaties*, 818 § 21; Note, 134, *A.L.R.* 885.

[10] *Connally* v. *General Const. Co.*, 269 U.S. 385, 391.

Should we ratify Convention with reservations?

In the event we ratify the Convention, should we, by reservation, expressly provide that citizens of the United States and persons within the territorial jurisdiction of the United States, charged with an offense defined in the Convention will be subject to trial and sentence only by a competent judicial tribunal of, and sitting within, the United States, vested with jurisdiction over such offense by federal legislation; that a citizen or other person so charged shall be presumed to be innocent until his guilt has been established by lawful evidence beyond a reasonable doubt; that a citizen or other person so charged shall be protected by all the safeguards embraced within the Constitution of the United States, including the rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States, to an accused charged with a domestic crime; and that such citizen or other person shall not be subject to be charged, tried, or sentenced by any international penal tribunal? Of course, no international penal tribunal has yet been created, and the advice and consent of the Senate would be necessary to subject our citizens to the jurisdiction of such a tribunal should it be created. But should we not endeavor to close the door to the giving of that advice and consent in the future?

Although the United Nations Charter provides that nothing therein contained shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, since our representatives have participated in the drafting and approving of the Genocide Convention, if it should thereafter be ratified by the United States, would the matters embraced in such Convention be thereby withdrawn from our domestic jurisdiction?

Should we agree to submit to the International Court of Justice a dispute as to the interpretation, application, or fulfillment of the Convention by us? Suppose a citizen of the United States was charged with one of the offenses defined in the Convention—the group involved being an alien racial group—and tried in a competent tribunal in the United States, and our domestic courts, including the Supreme Court of the United States, should hold the act did not constitute an offense under the Convention. Could the state, of which the alien group were subjects, seek a review as to the intrepretation of the treaty in the International Court of Justice? If it could not seek a direct review, could it seek an interpretation by the International Court which would be binding on our domestic courts in the future?

Should we obligate the United States to undertake to prevent and punish genocide in other states? Such seems to be the import of Article I of the Convention.

I assume that no one will deny that the acts defined in the Convention as offenses are abhorrent and the purpose to prevent them wholly commendable. The question is as to the method and means to attain that end.

If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under Section 8, Clause 10, Article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our own domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus set our own house in order, would offer the same protection to the accused as one charged with any domestic crime, and would reserve to our own courts the final determination of questions as to the interpretation of the penal statute. To agree, by international convention, to so define, try, and punish persons who commit the offenses which the treaty undertakes to define, would seem to me to wholly fulfill our international obligation, and would avoid many serious questions with respect to the incipient effects of ratification of the Convention on our constitutional and legal system and questions of policy which will arise on a consideration of concurrence by the Senate in the proposed Convention.

The CHAIRMAN. Let us go directly to the understandings presented by Senator Helms. Have you reviewed Senator Helms' two understandings and had an opportunity to thoroughly explore the implications of them?

Mr. ROBINSON. We have had that opportunity, Mr. Chairman. And with your permission, I would like to have my colleague, Ted Olson, address the first understanding and I would be happy to address the second understanding.

The CHAIRMAN. All right, fine. Just generally, with respect to both those understandings, are they necessary to protect U.S. interests?

Mr. OLSON. If I may address Senator Helms' first declaration, which provides that the U.S. Government "understands and construes the words 'in accordance with their respective constitutions' in article V to mean that the present convention or any provision thereof, shall become effective as the domestic law of the United States only through legislation which would be valid in the absence of the convention."

That, as I understand it, is Senator Helms' first proposal declaration. I have considered this and, while I may be wrong, it seems to me that this declaration is not necessary in light of the declaration which has been offered by the administration.

The fourth of the four matters that we have submitted specifies that the treaty would not be submitted until there has been domestic legislation. If it is the sense of the Senate that legislation implementing the Genocide Convention not go beyond the scope of the powers that Congress would have irrespective of the convention itself, then the Senate can limit the implementing legislation accordingly when it considers that legislation.

A proviso such as this, which is really different than a declaration, is something that is a matter of domestic concern to the Congress of the United States and, in our judgment, should not be added to the convention itself and put into the international arena.

The CHAIRMAN. To put it another way, then, do these understandings cover ground not already covered by the three understandings and one declaration previously proposed by this committee and that would be embodied as a part of our ratification vote?

Mr. OLSON. With respect to the first declaration, I think it covers ground that is already covered by the declaration offered by the administration. I will not speak, since the State Department will do so, to the second declaration.

Mr. ROBINSON. Mr. Chairman, with regard to the second understanding, which in effect would qualify the acceptance of the United States of the jurisdiction of the International Court of Justice under article IX of the Genocide Convention, that is indeed a subject that is not addressed by the understandings and the declaration proposed by the administration.

If we understand Senator Helms' proposal, in connection with this understanding the United States in effect would reserve the right to determine for itself whether a case brought against it under article IX of the Geneva Convention before the International Court of Justice addressed matters essentially within the domestic jurisdiction of the United States; in effect, a question similar to that raised with regard to the 1946 acceptance of the compulsory jurisdiction of the court.

While we certainly understand Senator Helms' concern, we do have difficulties with this proposal. First of all, from our perspective, the fundamental purpose of the Genocide Convention is to define genocide as a matter of international concern. That is to say that the international community is seeking to define genocide as a matter which no longer can be considered solely a question of domestic interest. Thus, it would appear to us to be somewhat incon-

sistent with the convention to suggest that some forms of genocide may not be proper concerns of the international community.

Now, in this regard, it is very important to emphasize, as I did in my opening statement, the narrow definition of genocide in the convention which is confirmed by the proposed understandings and declaration reported by the committee in 1976. This narrow definition, in effect, in our view will ensure that genocide will not be interpreted to include matters which are legitimately of solely domestic concern.

Furthermore, another problem that we see is that the second understanding is more in reality a reservation than an understanding, and it therefore would be the first reservation which the United States would be proposing with regard to this convention.

If we are correct that it does amount to a reservation rather than an understanding, that of course would raise several issues. For example, under the statute of the International Court of Justice in article 36(6) it is provided: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." And the meaning of such a reservation could, of course, be brought into question.

Furthermore, other parties to the convention might argue that such a reservation, if it is one, is incompatible with the object and purpose of the Genocide Convention. For example, the United Kingdom, Australia and the Netherlands have already objected on such grounds to reservations to article IX made by other states in their adherence to the Genocide Convention. Thus, some states might consider such a reservation inconsistent with international law and indeed consider us as not in treaty relations with them.

Under the principle of reciprocity, furthermore, such a reservation could be invoked against the United States to divest the International Court of Justice of jurisdiction in the event that the United States itself should seek to bring a dispute under the convention before the International Court of Justice as an applicant or as a plaintiff.

Finally, we would point out that, notwithstanding the Connally Reservation of 1946, which of course applied to article 36(2) of the statute of the court and not to Article 36(1), under which the Genocide Convention would fall, the United States is a party to 40 multilateral treaties and other international agreements which provide for the International Court of Justice to resolve disputes under them pursuant to the Court's jurisdiction under article 36(1) of the court's statute. The United States is also a party to 40 bilateral treaties and agreements with similar clauses.

So therefore, with all due respect to Senator Helms, the administration does not believe that this latter understanding is an appropriate one at this time.

The CHAIRMAN. I have just one more question on the Helms understandings. Do you in fact consider the Helms understandings to be such, or are they actually reservations to the treaty?

Mr. ROBINSON. Well, Mr. Chairman, as I indicated, with regard to the second understanding, it would be our concern that, in fact, it would amount to a reservation to U.S. acceptance of the Genocide Convention.

Mr. OLSON. The first one, as I indicated, Mr. Chairman, is more like a proviso with respect to the proposed implementing legislation, as opposed to an understanding of the convention itself.

The CHAIRMAN. OK. I think the record on that is clear.

Senator Pell, do you have any further questions on the Helms understandings or reservations?

Senator PELL. Not at this time.

The CHAIRMAN. All right. Then I will use up the balance of my time with one last question. Could you describe the process by which the administration reviewed the Genocide Convention and reached the determination that it is in the best interests of the United States to ratify it?

Mr. ABRAMS. Yes, Mr. Chairman. We began to discuss this in 1981, and of course you and the committee raised it at my own confirmation hearings, I guess in November 1981. And after that we began a more concentrated focus on it.

Frankly, I am quite surprised it took us this long, but it did. We started out in the State Department with a lot of discussion within the Human Rights Bureau as to whether to proceed and how to proceed, having in mind both the substantive legal considerations and also the political ones, that is, that as you said we did not want to have another go at it if we thought that the cause was lost and that the treaty would not be given advice and consent by the Senate.

After we had done some months of work in the Human Rights Bureau, with the ABA and a variety of other legal groups, we then turned to the Legal Adviser's Office and there then began months and months, I would say, of meetings, literally dozens and dozens of meetings and conversations within the State Department about what precisely should be the position we take. For example, under three understandings and declarations, should we re-endorse those, should we try to devise different ones or new ones?

Following that, we turned to the Justice Department and there then ensued months of discussions and meetings between the State Department and the Justice Department, as we tried to come up with a unified position, which we then did this summer. And at that point it was just a question of whether the announcement would be made on September 5, as it was, or a few days before or after. But actually, the final agreement came this summer within the Administration.

The CHAIRMAN. Thank you very much.

Senator Pell.

Senator PELL. Thank you very much, Mr. Chairman.

Some critics of the Genocide Convention have argued that it would supersede the Constitution, including the Bill of Rights. This brings up a fundamental question: Is it possible for a treaty to supersede the Constitution? I recognize that treaties can supersede domestic law.

Mr. OLSON. Under some circumstances a treaty might supersede domestic law and under some circumstances, subsequently enacted domestic law would be held to supersede a treaty. The Supreme Court has held, however, and all of the scholars that I have consulted on the subject hold that a treaty may not supersede or override the Constitution.

Senator PELL. Has the Supreme Court ever ruled specifically to the effect that a treaty was superior to the Constitution?

Mr. OLSON. No, the Supreme Court has never ruled that a treaty was superior to the Constitution, at least to my knowledge, Senator. I would be amazed if there were such a case. The Supreme Court has in fact held on a number of occasions that the Constitution was superior to a treaty, with specific language to that effect.

Senator PELL. Would you for the record submit a couple of citations.

Mr. OLSON. I can cite a couple of cases right now.

Senator PELL. Good. Would you, please.

Mr. OLSON. One that comes to my mind is *Reid* v. *Covert,* which may be found at 354 U.S. 1, a 1957 decision of the Supreme Court, at pages 16 to 17. Another earlier one, *Geofroy* v. *Riggs* at 133 U.S. 258, an 1890 decision at page 267. Another, of course, is the rather well known case of *Missouri* v. *Holland,* 252 U.S. 416, at 433 a 1920 decision.

Senator PELL. Thank you.

Does the Genocide Convention provide the authority by itself to extradite our own citizens to other nations? For example, if we ratified the Genocide Convention would we be obligated to conclude extradition treaties with countries such as Vietnam or Albania or other countries?

Mr. OLSON. May I let Mr. Robinson address that question?

Mr. ROBINSON. Senator Pell, as I indicated in my introductory statement, the Genocide Convention in and of itself is not an extradition treaty. It does not in and of itself require the entry into specific extradition treaties, and the practice in the United States is that we only extradite people pursuant to separate bilateral treaties.

Senator PELL. Thank you.

One of the understandings that we have proposed in past years would make it clear the treaty would permit the United States to try its citizens on charges of genocide rather than agree to extradite them. Previous implementing legislation would have directed the Secretary of State to make this clear in the negotiation of any future extradition treaties incorporating the crime of genocide.

Would this not in itself be an effective protection against abuse of the treaty by foreign governments?

Mr. ROBINSON. Yes, Senator Pell, it would indeed. And as I indicated, it would be the proposal of the administration that any implementing legislation that would be proposed would in effect permit the prosecution of U.S. nationals in U.S. courts for alleged acts of genocide outside of the United States, and that is in perfect keeping with the legislative history of the Genocide Convention, in fact going back to 1946 when it was initially drafted.

Mr. OLSON. I might add, Senator Pell, that I think the previous discussions of that subject would have involved a sense of the Congress or a sense of the Senate resolution, as opposed to a legislative direction to the Secretary of State with respect to a treaty which would be under negotiation. We believe a sense of the Congress resolution would be the preferable course.

Senator PELL. Thank you.

I would return to a point raised by Mr. Robinson. You mentioned that the treaty had originally been drafted in 1946. Is the institutional memory of the Department sufficient to recall when Raphael Lemkin's phrase "genocide" was first used? It was a word that was not used, for example, prior to World War II.

Mr. ROBINSON. I understand from one of my able colleagues that it was a term that in effect was coined in approximately 1943.

Senator PELL. By Raphael Lemkin?

Mr. ROBINSON. Yes, sir.

Senator PELL. Thank you.

I have one other question, which may perhaps be of a political nature. Has the administration made contact, or does it intend to, with the leadership here in the Senate with regard to scheduling this matter on the floor?

Mr. ABRAMS. Senator, I believe there have been some contacts. That is, questions have been raised by the administration about what the calendar looked like. I think actually what I guess I would call serious discussions would await the committee's further action, in the sense that, should the committee not report the convention out for some time, then it would make it much more difficult.

So to some degree I think the opportunity really does depend on how quickly the committee is able to act, given that there are so few legislative dates remaining.

Senator PELL. But has the administration pressed the leadership here to have it taken up?

Mr. ABRAMS. We have been in contact with the leadership and we plan to do so again.

Senator PELL. Not only in contact, but have you pressed the leadership to take it up?

Mr. ABRAMS. Well, I cannot speak to that because I personally have not done it. It was done through the Legislative Affairs Bureau and therefore I am reluctant to characterize those conversations.

Senator PELL. I would hope very much that there would be a unity of view between the committee and the administration on this, because unless it is taken up obviously this is just an exercise in politics, which is not what it is supposed to be.

Mr. ABRAMS. We certainly do hope that the committee can act quickly and that the full Senate can. It is our hope that the Senate can give its advice and consent in this session.

Senator PELL. Thank you.

Returning to the legal questions, as you know, the Senate has agreed to a lot of treaties over the years in which we accept the ICJ jurisdiction to resolve disputes or at least accept their right to resolve disputes concerning the interpretation of the treaty in question. Do you think those provisions contradict the so-called Connally reservation on the jurisdiction of the ICJ?

Mr. ROBINSON. Senator Pell, the Connally reservation that accompanied the acceptance of the compulsory jurisdiction of the World Court in 1946 is under a specific provision of the Statute of the Court, which is article 36(2).

Treaties that specifically refer questions to the International Court of Justice by the terms of those treaties do not fall under ar-

ticle 36(2) of the Statute of the International Court of Justice, but rather fall under article 36(1) of the Statute of the International Court of Justice. So, as I have tried to indicate in my response to the proposed understanding, because of the narrow definition of genocide and other considerations, we do not believe such a similar reservation is appropriate in this case.

Senator PELL. If we had been a party to this treaty during the Vietnam war, would it have facilitated the trial of American POW's by Hanoi for crimes of genocide?

Mr. ROBINSON. Senator Pell, in our view it would not have done so, because in such a case the Hanoi authorities would have had in their custody the American nationals. In other words, they would already be holding those American nationals. Now, in such a case if Vietnam wanted to trump up charges against our Americans that they were holding, they could do so whether there was or was not Genocide Convention.

So we would say that was a very different situation of a country having people in their own possession, so to speak. Furthermore, of course, that question, the question of prisoners of war, is dealt with by the Geneva Conventions applicable to the law of war.

I might also point out that we believe in this connection that if the Genocide Convention is ratified, the narrower definition of genocide could even be helpful in this regard.

Senator PELL The genocide convention in connection with this definition refers to inflicting "mental harm" as being an offense covered by its terms. Could you give me an example of a situation that would involve inflicting mental harm as an offense under the convention?

Mr. ROBINSON. Senator Pell, one of the understandings addresses that issue by in effect stating that those terms as we understand them and construe them mean permanent impairment of mental faculties. Emotional distress, for example, would not fall within that. And if I recall, in fact the report of the committee in 1976 I thought quite eloquently addressed that very issue.

Senator PELL. Thank you.

Finally, would our own actions vis-a-vis the American Indians be considered genocide, looking back from an historical viewpoint?

Mr. ROBINSON. Well, I would certainly think that that would not be the case. The issue of genocide is one of, again under the understanding, is one that has to have a specific intent to in effect destroy American Indians in substantial part as a group. Now, I would suppose one could have large debates about that issue, but I would think it would be very doubtful that one could find a specific intent on the part of the United States Government at any time in our history to carry out such an action.

Senator PELL. Thank you very much.

The CHAIRMAN. Thank you very much, Senator Pell.

Senator Biden, I did not see you come in. Do you have any questions?

Senator BIDEN. Thank you.

I have just one question, gentlemen. As I understand it, the understanding has been that we will not in fact deposit the instrument of ratification until the implementing legislation has been enacted. I sit on the Judiciary Committee, am the ranking member of

that committee, and my understanding is that it will come to that committee.

Do you have such legislation prepared? If so, what does it say and when will I get it, and how rapidly do you want me to move in the Judiciary Committee?

Mr. OLSON. We do not have the legislation prepared. We hope to have something that we could discuss with the Congress in the reasonably near future. There was legislation proposed and introduced in this body in 1976.

There have been some questions raised with respect to the legislation. Frankly, enough questions have been raised about the subject and how terms might be defined in the legislation, and it is a sufficiently serious matter, that that is something that we think is worthy of considerable discussion.

We will move as rapidly as possible, Senator.

Senator BIDEN. Well, you know, I guess I am sometimes too blunt. I am sure it is not the first time you have heard that there are people wondering why, after 3½ years, with 3 weeks left to go, that a President who, although he is way ahead, may possibly be covering all of his bases—you know, any of us politicians, whenever we are ahead we never believe we are ahead enough. Evidence President Nixon and every other Democratic President.

So there is some skepticism about the sincerity. Now, what I want to ask you is, how can you, after 3½ years, tell us it is important to ratify this right away, knowing that in fact, we will not deposit this, even if we ratify it, that it will not become effective under U.S. law, we will not agree to it, until we have agreed implementing legislation—which is going to be twice as hard to get through the Judiciary Committee as here.

You think you have problems with Senator Helms. Take a look at my committee: Admiral Denton, Strom Thurmond. They are all fine men, but very, very conservative men. Mr. Hatch.

So what I want is a straight answer from you. Really, how soon do you want this treaty to take effect? How important is it?

Mr. ABRAMS. We would like the treaty to be ratified and the implementing legislation to be approved as soon as possible.

Senator BIDEN. Well then, get it up here.

Mr. ABRAMS. Now, the treaty obviously can be done quickly. I do not think that it would have been a particularly useful way for the Justice Department—and Mr. Olson may want to comment on this—for the Justice Department to spend its time to put into final form such legislation until the State and Justice Departments had really decided on an administration position on the treaty itself.

We do not intend to delay——

Senator BIDEN. That is exactly what my point is. Here the administration is telling us this is important. You are all part of this administration. Justice has not made that decision.

How in the heck are you telling us that you want this thing, the President is saying this is an obligation, the morality, he is up there talking about genocide and we are for that treaty, and he walks into B'nai B'rith and tells them he is for it, and you all ain't even figured out the most cr ical element in whether or not it becomes the binding law of the United States.

Mr. OLSON. Senator, this convention has been before the Senate of the United States for 35 years and has not been ratified by the Senate of the United States. Six Presidents have tried and failed.

Senator BIDEN. I agree.

Mr. OLSON. We have endeavored through the process that we have gone through to be thorough and deliberate. The process has to be gone through one step at a time. Ratification by the Senate is the first step, the implementing legislation is the second step. The administration is committed to move forward on this.

Now, unless all of the participants have an opportunity to be heard and the problems that will be ventilated in your committee and the Judiciary Committee and the relevant committees in the House are considered and thought out, then we may fail again and this will be the seventh President and it may be another 10 years before this convention is ratified. We are very anxious to have it done and done successfully.

Senator BIDEN. Well, why did we not start ventilating it 6 months ago? You know nothing goes through that committee rapidly. You know that committee. It has taken me 7 years to get a crime bill passed and a long time to crack down on drug smugglers. We have trouble even agreeing on where we sit on that committee.

Mr. ABRAMS. Senator, the first step was for the administration to reach a decision as to whether it was going to push for ratification of the Genocide Convention. That was the first step and that step was taken.

Senator BIDEN. Right, got you.

Mr. ABRAMS. Judging from what you say about the committee, to have tried in a 1-week period to come up with criminal legislation would have meant a sloppy job, which probably would have made more troubles for us and for you when it comes time to try to pass that legislation.

Senator BIDEN. Gentlemen, with all due respect, it is a little like my saying to my son: "Beau, I have decided you should go to college." He says, "Wonderful, great, happy." And then I say: "By the way, I have not found out whether I am going to help you. I know you do not have a job, I know there is no way you can get the money. But I have decided you are going to college, but I have not made the decision whether or not I am going to give you the money to go to college, or that I am going to let you work."

Now, that is phony. The press loves that word. The press is going to probably write a headline which I suspect will be, "Biden calls the administration phony."

But what I am saying is, I suspect that you have not thought it all the way through and that maybe it came up, maybe the President is committed to it now. But how can you be saying to us that you really and truly want this when you have not figured out in your mind what the enabling legislation should be.

Mr. OLSON. We are anxious to put that before you and discuss it and work out the details. I can only say that of the six previous Presidents that advanced the Genocide Convention in the Senate of the United States, so far as I am aware, none of them had legislation completely prepared and fully worked out prior to submission to the Senate. So the process that we are following is one which Presidents in the past have pursued, for similar reasons I suspect.

It is very important to get the ratification. That may give momentum to the implementing legislation. It also may give us ideas on matters that we may need to adjust in the implementing legislation that we plan to offer.

We are in full sympathy with the concept, as is the President, of moving this as rapidly as we can.

Senator BIDEN. I understand that. And I would also point out, I may be wrong, but I think this is the first President who 8 weeks before the end of a campaign announced his support for it that I am aware of, having been silent on it up to that point.

And I am the ranking member of that committee. No one has even breathed a word to me. No one has even said to me in the last 3½ years: Genocide, maybe we will talk about it. Nobody has said a word. I don't doubt your sincerity.

Mr. OLSON. As far as we were able to determine and research this, some of the other administrations that addressed the question of the Genocide Convention with the Senate did so reasonably late in their administrations also, for the very reason that this is a matter that is worthy of consideration and thought.

Mr. ABRAMS. There is another pattern, Senator. The Carter administration endorsed the genocide treaty and every other treaty under the human rights movement early on and then did not lift so much as a finger to pass it. That is not what we plan to do.

We wanted to do our work first, make the decision. The Justice Department is hard at work now on that implementing legislation. That is not going to come to you in January. It is going to come to you very soon.

The problem in 35 years has not been administrations. It has in fact been the Senate, and I think in a sense it is unfair for you to try to shift the burden to the executive branch.

Senator BIDEN. I agree, by the way, it is the Senate. And that is my point. It will be the Senate again. The difference here is we have a President, to use the old cliché, like Nixon could go to China and only Nixon, probably only Reagan could pass the genocide treaty. He is the father of the right wing, he is the father of the radical right in America, and when he stands and says something it makes it awful hard.

There is not a whole lot more room to the right, even with my good friend Jesse Helms, who is a brilliant Senator in terms of his effectiveness, and the points that he proposes. It is very hard for Jesse Helms to get to the right of Ronald Reagan. Now let us talk practical politics here.

And so the fact of the matter is that you are right about the Senate, and that is my point. This is the time to strike. I hope you are ready in the next week or so to come to Strom, who is a reasonable man, and say: Strom, the Senate is doing it, the Foreign Relations Committee is doing it; let us do it.

And I am anxious. I believe everyone, including myself, is capable of redemption, and I am hoping to be redeemed myself, and I am prepared to see redemption for everyone else. I am anxious to get it passed. This is a great opportunity.

This President may be able to do something of historic proportions that no Democrat has been able to do. I think it is a real shot.

Please do not wait until September 28 to tell us on the Judiciary Committee what you think the best way to go is.

Anyway, thank you very much, Mr. Chairman.

Mr. ROBINSON. Senator Biden, if I might, I have one brief comment. We appreciate that, and I think it should not be forgotten that the declaration to which you make reference, which in effect ties the ratification of the Genocide Convention to the implementing legislation, is the declaration that has been propounded by the Senate Foreign Relations Committee itself, and the administration in effect in endeavoring to expedite the process in the Senate is simply adopting the very understandings and declaration that the Senate Foreign Relations Committee itself proposed in 1976.

Senator BIDEN. I agree.

Mr. ROBINSON. So that is the rationale, in effect, for the linkage.

Senator BIDEN. For dealing with this committee. But you could understand how someone, if they wanted to be skeptical, could make the point that maybe since you did not talk to the other committee—well, anyway, thank you, Mr. Chairman.

The CHAIRMAN. Senator Biden, I want to say that I can understand your political frustration, having witnessed Muriel Humphrey accepting the Gold Congressional Medal of Honor on behalf of her beloved husband and our beloved colleague yesterday. I could well recall Hubert Humphrey saying to me some years ago,

> You know, it takes a conservative Republican to get done all those progressive things that we Democrats have espoused but have been unable to carry out.

He said to me:

> Can you imagine if I had gone to Peking, if I had sent my Secretary of State on a secret mission there, and if we had then recognized Communist China. If I had signed SALT I with the Soviet Union, I'd have been ridden out of town on a rail, but Nixon can get by with it.

And it is true. I think the process really works. There has been a dramatic swing in Canada, another great democracy. The process is working. Under the new Prime Minister, they are going to get done a lot of things that are frustrating to the Canadians. They have finally said we have to have a change, and we are going to have a change.

The pendulum swings back and forth. It just so happens this is the time for fiscal conservatists—and it is frustrating politically for our opposition to realize it—but we have a program underway through which we can accomplish a tremendous amount.

I have quoted George Eliot many times. "Leave us not inquire to the motivations of man." The political process that we love really does work, and I am very pleased to see the administration take a firm position on a highly controversial issue that can help move us forward, and without that help we couldn't move forward.

I would only hope that the same motivations and the same spirit would enable us to adopt two treaties that have been long lingering, one of them 12 years, the Threshold Test Ban Treaty, and the Peaceful Nuclear Explosion Treaty; one signed by President Ford, one signed by President Nixon; neither of them ratified, because we just haven't come to grips with them.

This committee and the Senate would adopt both of the treaties overwhelmingly if we could get a recommendation on those treaties

as well. And I think we can and should move forward, and I hope there would be such a discussion with Foreign Minister Gromyko when he meets with the President and the Secretary of State.

Senator BIDEN. Mr. Chairman, may I have just 30 seconds? I want to make it clear that I love the political process that we have and I love our President. I want to make it clear. [Laughter.]

The CHAIRMAN. We will put that on the record and quote it extensively. [Laughter.]

I have two questions and we have a business meeting that begins in just a few minutes. But first, Senator Dodd, you have not yet been recognized for your questioning, and I recognize you for the purpose of your questions at this point.

Senator DODD. Thank you, Mr. Chairman.

Mr. Chairman, it is my fervent hope that before this Congress adjourns we will be able to eliminate a 35-year-old painful and embrassing inconsistency in our foreign policy, our failure, so far, to ratify the Genocide Convention. I express this hope very guardedly, as I am preserving among my papers a statement by my own father, delivered over 19 years ago on the Senate floor, expressing cautions hope that the convention can be brought to a vote before that session of Congress ended, the first session of the 89th Congress.

Most of the opposition to this convention has been based on misunderstanding and misrepresentation. In reality it incorporates a simple and straightforward proposal. Its ratification would obligate us to do no more than declare genocide a crime under international law and implement domestic legislation to punish such crimes. All acts punishable under the Genocide Convention are very probably already punishable under existing Federal and State laws. The significance of the convention does not lie in establishing new categories of punishable behavior. Its significance is largely symbolic in setting internationally sanctioned limits to the most outrageous excesses of mass violence. We are the only major country in the world who has failed so far to ratify the convention.

This time maybe we will be able to do it. That the Reagan administration finally expressed full support for ratification ought to be enough to make the difference. Still, I feel compelled to ask the question, why did this endorsement take so long? It took over 3½ years for the administration to announce its position. The pretext for this stalling, according to the recent announcement, was an "extensive review" of the convention. I am really curious—what did a 3-year-long review involve? Not a single new question has been raised about the convention in about 10 years. This committee has met over a dozen times since 1950 to review and debate the subject. Every question, every argument and counterargument has been raised and answered repeatedly.

What really happened that the administration realized that it can reap some political benefit or avoid some political embarrassment by endorsing the convention. If the prestige of our country was their concern, if they cared about the continuation of our leadership role in the development of international law, if they felt that our concern for human rights must go beyond using that concept for propaganda purposes against our adversaries, this adminis-

tration could and should have made this endorsement a long time ago.

Belated as this endorsement is, Mr. Chairman, it is a positive step, and this committee has to take full advantage of it. I hope we can vote today and send the convention to the whole Senate without delay. I expect a lively and substantial debate there. At this point, without going into any of the specific questions raised above the convention, I want to say a few words about its relation to our Constitution.

Our Constitution is a very resilient masterpiece of legislation and in our system no international agreement can weaken or supersede its provisions. The Genocide Convention is not a self-executing treaty, its provisions would be valid domestically only through carefully crafted legislation by the Congress of the United States. Beyond that, however, our Constitution envisioned this kind of legislation when it provided in article I, section 8, clause 10, that: "The Congress shall have power * * * to define and punish * * * offenses against the law of nations."

Therefore, our implementation of the Genocide Convention is not contrary to our Constitution and is, indeed, an act done in the very spirit of our Constitution.

Mr. Chairman, we must join the community of 96 nations who declared unanimously that genocide is a crime under international law and that governments are obligated to prevent and punish it. Let us erase this ugly stain from our outstanding record of promoting humanitarianism, civility and the rule of law nations. Let us move this treaty to a floor vote without delay.

I have just a couple of questions. First of all, I am delighted and pleased that the administration has decided to support the Genocide Treaty and asked the Senate to ratify it.

I think possibly the statements of one or both of the witnesses today have included some of this information, but I would just reiterate it. As I understand it, between 1950 and 1981, this committee has held some 11 days of public hearings on the Convention, compiling a transcript of 1,364 odd pages of testimony, on questions about the various constitutional and legal issues raised by the convention itself.

There were 84 witnesses who have testified before this committee in person over the past 35 years, and some 200 other items of evidence have been submitted to support or oppose various positions.

These hearings do not include, however, executive sessions of this committee where the convention was also debated, witnesses heard and other evidence taken. A special subcommittee and the committee itself has reported the convention to the full Senate favorably on five different occasions over the past 35 years. And in 1974 the Senate debated the convention during 5 days, the record of which amounts to some 67 pages in the Congressional Record.

As has been pointed out, the problem has been the Senate; Presidents Truman, Kennedy, Johnson, Nixon, Ford, and Carter, supported the convention the only exception being Eisenhower, who did not ask for ratification of this treaty for his own particular reasons.

I have questions but I won't bother raising them because an extensive record piled up—and I went through them last night—some 11 or 12 volumes that comprise the almost 1,500 pages of evidence.

What I am getting at, I guess, is this. It is 8 weeks before the election, and I am just curious because it has been pointed out that there was an extensive review of the convention over the past 3½ years. What did this administration discover that had not been thoroughly examined and explored and supported by Republican and Democratic administrations over the past 3 years, administrations of both parties?

It took this administration up to 8, 9 weeks before an Election Day all of a sudden to decide they support it.

Mr. ABRAMS. Well, it was not all of a sudden, Senator. As I indicated before, it was the product of a very long series of meetings, first within the State Department, and then between State and Justice.

Senator DODD. When did you tell them you supported it? When did the State Department tell the White House that the State Department, after its review, supported the Genocide Convention?

Mr. ABRAMS. The early part of the summer, if I remember right; late spring or early summer. We had reached that conclusion within the State Department, but wanted to have a unified position, so we went to Justice first in an effort to make sure that Justice also supported it.

One of the considerations, of course, is——

Senator DODD. Would you just give me some framework for that? I think it might help clear some of this up. I know, Elliott, you have sort of indicated that you didn't think this was a bad idea for some time.

Mr. ABRAMS. I indicated that—well, personally, if my memory is right, we probably reached that conclusion in the State Department around the beginning of this year. And then Justice and we had a joint position probably in the late spring.

There was a question first as to whether to take the three understandings and the declaration or to attempt to make up new ones. And the reason for that was, I think, a simple one. Those three understandings and the declaration had failed to achieve ratification, so the question was do we need to do more to achieve ratification, and will that package make it? It had not in the past. Or should we try to put together a new package that would have a better chance?

In the end, we decided that that was not the right way to go; that we should stick with the old package. But that meant that we went through a lengthy process of thinking what might a new package look like. And again, within the State Department, then between State and Justice, what might a new package look like that was legally acceptable and politically more promising?

In the end, we decided that there wasn't any and that the smart way to go in order to achieve ratification was to stick with the old package and simply push it, try to push the administration behind it. And that conclusion was reached probably in the late spring.

Senator BIDEN. When Justice also came on board?

Mr. ABRAMS. Yes.

Senator DODD. I realize that even that is a relatively short period of time. If we are talking late spring, I would assume May, and we had the conventions coming up in the summer still we had a period of time in July, even before we left, to be able to move things along.

You have heard Senator Biden talk about the difficulties he will have or The Judiciary Committee will have, I presume, in trying to get implementing legislation through.

Given the importance of all of this, why was the decision made not to bring this matter up before the Senate in late spring once the decision by the White House had been made?

Mr. ABRAMS. Well, there was no White House decision that early. The first decision was whether the State Department and Justice Department both separately supported ratification and with this particular package. Then there were political questions to raise. For example, could it pass? If it could not pass, if we were absolutely persuaded that this treaty was going to go nowhere, then should we endorse it or should we wait until next year?

Senator Biden's comments, of course, occurred to us, too. That is, we thought well, are we going to get nothing but criticism for doing this? If that is true, then maybe we ought to wait until after the election and endorse ratification in November with the theory that we would get it through on a second term. So we had to take that into consideration, too.

But again, in the end, the decision was that if everybody in the administration was now agreed, then let's just announce it. But because of the conventions, vacations, delays and so forth, actually the number of opportunities to move from late spring and early summer to Labor Day are really very small up in the executive branch, as here on the Hill.

Senator DODD. Now, I think most of us here supported your confirmation, and in fact your difficulties were less on this side of the aisle than I think they were on the other, if my memory serves me well.

Mr. ABRAMS. It was unanimous, Senator. I remember it very well. [Laughter.]

Senator DODD. I remember your statement at the time we asked you about your priorities. Now, I cannot quote you exactly, but I do not think you will argue with me if I paraphrase your statement before this committee at your confirmation hearing, where you stated that your very first priority, once some organizational questions were taken care of, was to present to this body the Genocide Convention.

What are your second and third priorities?

Mr. ABRAMS. Well, you will find out next term, I guess. [Laughter.]

That is my memory, too, and I was astonished. I actually expected that we would be able to be where we are today in the summer of 1982, 2 years prior to now, and was amazed at the amount of time that it took, obviously in part because everybody has other work to do at the same time. No one can devote full time to the Genocide Convention.

Senator DODD. I understand.

Mr. ABRAMS. The other problem is, again, politically we found that a lot of groups were for the convention, but unwilling to do a very great deal for it because it was not their top priority. But the real delay had not anything to do with politics. The delay was caused by the tremendous amounts of legal—well, in one word, lawyers; the tremendous amounts of time it took to go over and over again the legal work, again in part because our operative notion was that we would have to come up with a new package, the old one having failed, and it was really rather late, around the beginning of this year, that we all gave up on that and decided to stick with the old package.

Senator DODD. Well, let me ask you this. We only have a few weeks left. I don't know how many days are left between now and October 4, which is the target date for adjournment sine die, as I understand it. I don't know if that has been established categorically or not, but the word is there will be no lame duck session. And there are obviously appropriations bills and so forth that you are aware of that this body has to consider.

Is it the administration's position that they would like the Senate of the United States to debate and to ratify the Genocide Convention before we leave on October 4?

Mr. ABRAMS. Yes.

Senator DODD. Has the administration asked the majority leader to schedule such hearings?

Mr. ABRAMS. To schedule it on the floor?

Senator DODD. Floor time and debate.

Mr. ABRAMS. Well, as I indicated to the chairman before, I have not communicated with him. That has been done through the Legislative Affairs Bureau. The Legislative Affairs Bureau has discussed that with the majority leader and not me personally, so I cannot characterize those discussions.

I think we would not insist—I think it would be senseless to do so, that the majority leader schedule this if it is clear to him that there will be a lengthy filibuster and that it will make it impossible to conduct other very crucial Senate business to do so.

My hope is that that is not the case and that therefore he will be able to schedule it. But we cannot tell him how to run the schedule. We can only tell him how much we hope that this is done.

Senator DODD. Well, if I were to offer a motion in this committee in the form of a resolution urging the majority leader or the leadership of the Senate to consider the Genocide Convention prior to our adjournment on October 4, what you are telling me this morning is the administration would support such a resolution?

Mr. ABRAMS. Yes.

Senator DODD. I thank you.

Mr. Chairman, I think most of the questions have been addressed and raised by yourself and Senator Pell on the specific questions, the legal issues. And obviously, since you are not substantially changing in any way the submission of the convention in 1950, we have an adequate body of material in questions that have been asked over the years to deal with it, and you will be basically adhering to those positions that have been adhered to by the Presidents and administrations that I have mentioned.

Is that correct?

Mr. ABRAMS. We have adopted the package as you reported it out in 1976 in toto.

Senator DODD. In toto. I thank you.

And, Mr. Chairman, I thank you.

The CHAIRMAN. Thank you very much.

Senator TSONGAS. I would just like to say how pleased I am about the evolution of thinking on this issue. Some have argued that the administration's position is purely political. I don't frankly care whether it is or not. I think this is an important issue.

I want to say, once having passed, we will probably never hear of it for years and years and years, but I think symbolically the nonratification has hurt the United States. The administration should be commended for what it has done.

Thank you.

The CHAIRMAN. Thank you very much, Senator Tsongas, and I commend the administration for your testimony this morning.

I would like to submit the balance of my questions to the administration to answer for the record, and will keep the record open until they can be answered.

In closing this hearing, I have just been handed a letter from the American Bar Association updating their thinking on this and supplementing their testimony given at our hearing in 1981.

DEAR MR. CHAIRMAN: I was pleased to learn that you have scheduled hearings tomorrow morning to hear testimony from the Administration in support of ratification of the Convention on Prevention and Punishment of the Crime of Genocide (Executive O, 81st Congress 1st Session). I write to reiterate for the record the American Bar Association's strong and continuing support for prompt Senate advice and consent to ratification of this fundamental international treaty and to urge you and your colleagues to expeditiously approve this Convention for immediate consideration by the full Senate.

During your most recent hearings on this treaty in 1981, the American Bar Association was ably represented by three witnesses—Professor John Moore of the University of Virginia Law School, who is chairman of the ABA's Standing Committee on Law and National Security; Honorable Thomas Buergenthal, Dean of the Washington College of Law, and the only United States Judge on the Inter-American Court of Human Rights; and Bruno Bitker, a recently deceased lawyer from Milwaukee, Wisconsin, who was a past chairman of the ABA's Standing Committee on World Order Under Law, and one of the nation's acknowledged experts on and most gifted advocates of the Genocide Convention.

The testimony of the ABA witnesses in 1981 fully stated the ABA's reason for considering ratification of this treaty a legislative priority. I would ask that that testimony be incorporated in the hearing record as part of this letter. With the testimony tomorrow by the Administration's experts, the record before your committee and before the entire Senate could not be more complete; any suggestion that additional information is needed before the Senate acts should be viewed as dilatory.

Genocide long has been accepted as a violation of the customary international law—nations with some three-quarters of the world's population have ratified this treaty, and the time has long since arrived when the United States should also formally condemn this most heinous of terrorist acts.

As President Reagan said to the closing session of the annual meeting of B'nai B'rith International earlier this month, "Anyone who has contemplated the horror inflicted on Jews during World War II, the deaths of millions in Cambodia, or the travail of the Mesquito Indians in Nicaragua must understand that if free men and women remain silent in the fact of oppression, we risk the destruction of entire peoples." On behalf of the American Bar Association I could not more eloquently state the case for Senate advice and consent to the Genocide Convention than has President Reagan. The Convention has been pending before the Senate for 35 years; the time has now come to ratify it so that, as President Reagan noted, it can be used "to expand human freedom and fight human rights abuses around the world."

I commend your leadership in responding so promptly to President Reagan's call for ratification of the Genocide Convention. Please know that the American Bar As-

sociation stands ready to assist you in assuring an overwhelming Senate vote of approval before the adjournment of this Congress.

Sincerely,

JOHN C. SHEPHERD.

The CHAIRMAN. If there is no further business to come before this hearing, the hearing is adjourned, and I thank our distinguished witnesses very much indeed.

[Additional questions and answers follow:]

STATE DEPARTMENT'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

Question 1. Concern has been expressed by some that if the United States ratifies the Genocide Convention, American citizens accused of genocide would be subject to the jurisdiction of an international court. Is this possible? If so, how can this be prevented from occurring?

Answer. American citizens accused of genocide would not be subject to the International Court of Justice, before which only States Parties could appear. While in Article VI, the Convention envisions that persons charged with genocide could be tried by "such international penal tribunal as may have jurisdiction," no international penal tribunal exists, nor does the Convention require the United States to accept the jurisdiction of such a court if it were created. If such a court were proposed in the future, Congressional action would at that time be necessary for the United States to accept its jurisdiction.

Question 2. Isn't it true that there is ample precedent for the United States to enter into treaties which seek to define and punish international crimes as such? Does this effort to define and punish acts of genocide differ from similar treaties recently approved overwhelmingly by the Senate which establish such international crimes as "hostage-taking" or the unauthorized diversion of sensitive nuclear materials?

Answer. There is ample precedent for the United States to enter into treaties which define certain crimes and provide for their punishment. The Senate has already given its advice and consent to several such treaties, including the Convention on the Physical Protection of Nuclear Materials, the International Convention against the Taking of Hostages, and the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance. Moreover, Article I, section 8 of the United States Constitution empowers the Congress to define and punish offenses against the law of nations.

Question 3. Some opponents of ratification have argued that this treaty is not constitutionally sound because under our system treaties should only deal with matters of "international concern."

Wouldn't you agree that the extermination of European Jews by the Nazis was a legitimate matter for international concern? Wouldn't this be true of other genocidal acts such as the attempted extermination of certain tribal groups by Idi Amin?

Answer. Since at least 1946 when the General Assembly of the United Nations condemned genocide as a crime under international law, it has been recognized that genocide is properly a matter of international concern. As Mr. Robinson indicated in his testimony, the Administration agrees with this assessment.

Question 4. The Senate and House Judiciary Committees would have the initial responsibility for reviewing and approving legislation to implement this convention should it be approved by the Senate.

The Foreign Relations Committee has repeatedly recommended that the Genocide Convention be approved only with a declaration making clear that it would not come into force for the United States until such legislation is passed. What would be the effect of this declaration on United States domestic law? Does the Administration fully support this declaration?

Answer. The Administration fully supports this declaration. Under it, the deposit of the United States instrument of ratification would not be made until implementing legislation had been enacted. This ensures that the Convention will not enter into force for the United States prior to enactment of the implementing legislation required by Article V of the Convention.

Question 5. One serious charge against this treaty is that it's definition of genocide is not sufficiently precise. Would you care to comment on whether the definition is too vague to satisfy normal criminal law standards?

Answer. As clarified by our two understandings, we think the terms of this Convention are sufficiently precise. We are confident that the Congress, which has on a number of occasions implemented conventions by the enactment of criminal legislation, will define the domestic crime of genocide in terms that meet our constitutional standards.

Question 6. Would you agree that a constitutionally valid treaty can have a simultaneous effect on external matters and at the same time have an internal aspect? Isn't this the case with the Genocide Convention?

Answer. Treaties have both international and domestic effects. A treaty may frequently establish obligations among sovereign States. Under Article VI of the United States Constitution, a treaty also becomes the supreme law of the land. Because the Genocide Convention is not self-executing, the domestic effect of this Convention will also be affected by the scope of implementing legislation.

Question 7. Would it be possible for an American citizen to be accused and tried for the crime of genocide for discriminating against or taking violent action against individual persons?

Answer. Under the Convention, the act of genocide requires both the presence of a specific intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," and the commission of one or more overt acts defined in Article II. Furthermore, the first proposed understanding makes clear that the specific intent to destroy a group means the intent to destroy a national, ethnical, racial, or religious group by specified acts in such a manner as to affect a substantial part of the group. Whether an action by an American citizen would constitute genocide would depend upon the totality of the circumstances in an individual case.

Question 8. Some critics of the Genocide Convention have contended that the treaty would infringe on the First Amendment right to freedom of speech since one of the acts that would be punishable as genocide is "direct and public incitement to commit genocide." Do you agree? Has the Supreme Court considered this question?

Answer. United States courts have held that treaties to which the United States is a party are subject to the United States Constitution. Thus, even if the terms of the Convention could be construed to conflict with the First Amendment right to freedom of expression, the Constitution would control. In *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969), the Supreme Court drew the line between protected and unprotected speech: "[t]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

Question 9. Could an American citizen be tried for genocide before the International Court of Justice? Why not? Pursuant to the Convention, under what circumstances would the United States be compelled to appear before the International Court of Justice to answer allegations that it had committed genocide? Would the Soviet Union or other comunist countries be able to bring such charges against the United States taking into account the principle of reciprocity in international law?

Answer. Amercian citizens accused of genocide would not be subject to the International Court of Justice, before which only States Parties could appear. A contracting party could bring an action against another contracting party for disputes with that party relating to the interpretation, application or fulfilment of the Convention, including those relating to the responsibility of a State for genocide or for any of the other acts specified in Article III. However, because the U.S.S.R. and several other Communist States have entered reservations to Article IX of the Convention, the reservations could be invoked against that country should it bring suit against the United States before the International Court. Under the United Nations Charter, the mechanism for enforcing judgments of the International Court is through the United Nations Security Council.

[Whereupon, at 11:14 a.m., the committee recessed, to reconvene immediately with a business meeting.]

APPENDIX

STATEMENT OF HON. JEANE J. KIRKPATRICK; PERMANENT REPRESENTATIVE OF THE UNITED STATES TO THE UNITED NATIONS

President Reagan has joined Presidents Truman, Kennedy, Johnson, Nixon, Ford and Carter in asking the Senate to ratify the Convention on the Prevention and Punishment of the Crime of Genocide. I, of course, fully endorse and welcome President Reagan's initiative in seeking Senate ratification of this important Convention, which the United States first signed in 1948.

I believe that the Senate's ratification of the Convention will enhance the standing of the United States in the United Nations and other international organizations. The Soviets and others hostile to the United States have long focused on the United States' failure to ratify the Convention as a part of their anti-American propaganda. It is contrary to our national interest to provide fuel to this campaign by failing to reaffirm clearly and unequivocally U.S. support for the important objectives of this Convention.

Despite the horrors of the Second World War which gave rise to the term genocide, and despite various international efforts, genocidal practices continue. This Convention can be of only limited value in combatting this scourge. It has no automatic enforcement provisions and is esentially self-implementing. Ratification of the Convention would, however, as President Reagan has stated, reaffirm "the fundamental and timeless American commitment to human rights." Ratification would also advance our shared objective of realizing the goal of the Convention—a world free from genocide.

STATEMENT OF HOWARD PHILLIPS, CHAIRMAN, THE CONSERVATIVE CAUCUS, VIENNA, VA

No sensible person favors genocide. But while this treaty would do absolutely nothing to prevent or punish governmental acts of political genocide (such as those committed by Nazi Germany, the Soviet Union, Communist China, and Pol Pot's Cambodia), it could make individual American citizens subject to extradition and prosecution without the safeguards an protection afforded by our system of justice.

As former Secretary of State John Foster Dulles has pointed out: "Under our Constitution, treaties become the supreme law of the land. They are indeed more supreme than ordinary laws, for Congressional laws are invalid if they do not conform to the Constitution, whereas treaty laws can override the Constitution. Treaties . . .can cut right across the rights given the people by the constitutional Bill of Rights."

Article VI of the Genocide Convention says: "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

According to Phyllis Schlafly, "our Government would be required, under the terms of the Genocide Convention, to extradite any citizen charged with genocide to the jurisdiction of some foreign court, whether the charge is trumped up or not . . . Our unigue American guarantees . . . the privilege against self-incrimination, the protection against unreasonable searches and seizures, the writ of habeas corpus, and the right not to be denied life or liberty without due process of law—would be meaningless in a foreign court."

There is absolutely no sound argument for making American citizens subject in any way to the World Court, or other international bodies heavily influenced and sometimes dominated by personnel from Communist dictatorships.

Control over interpretation of the Genocide Treaty—and its application to individual U.S. citizens would be surrendered to the "International Court of Justice—which recently ruled in favor of the Soviet puppet government in Nicaragua, and against the Reagan Administration.

The treaty stipulate that genocide includes causing "mental harm" to members of a "national, ethnical, racial or religious group." Theoretically, FBI agents and police could be turned over to the World Court for harassment of the Black Panthers. With the help of legal services lawyers, migrant workers could bring farmers before the World Court. Numerous other examples can be imagined.

During the Vietnam war, American soldiers were accused of genocide by the Soviet-backed Viet Cong. If the treaty had been ratified then, POWS could have been tried, with full U.N. support, at the whim of our enemies.

The treaty, which sweepingly includes "complicity in genocide" and "conspiracy to commit genocide" applies to "persons charged with genocide" whether they are "public officials or private individuals".

If this treaty is ratified, Americans will risk losing the precious liberties protected by our Constitution—unwisely swapping our rights for foreign "justice", often as interpreted by our Soviet adversaries.

STATEMENT OF THE LUTHERAN COUNCIL IN THE U.S.A., WASHINGTON, DC

More than a decade ago, in 1973, the Lutheran Council in the U.S.A. called upon the U.S. Senate to approve the ratification of the United States Convention on the Prevention and Punishment of the Crime of Genocide, better known as the Genocide Treaty. During the ensuing years, the Council has continued its commitment to human rights on a broad front. We are especially pleased that the Genocide Treaty now has the support of President Reagan, and hopes that the Committee on Foreign Relations will act is an expiditious manner to approve of it.

The March 1973 statement of the Lutheran Council is as follows:

The Lutheran Council in the United States of America;

Commends the United States for having exercised an important influence in the United Nations in drafting and adopting the Declaration of Human Rights and international covenants intended to move toward the implementaion of those rights;

Affirms that the practice of genocide which attempts to destroy in whole or in part particular national, ethnic, racial or religious groups is barbaric and rightfully adhorrent to all people of justice and good will;

Notes that President Nixon has asked the Senate, as President Truman did two decades earlier, to ratify the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the U.N. General Assembly in 1984, and that the Senate Foreign Relations Committee, after extensive hearings, recommended ratification with the addition of certain statements of understanding.

Encourages the U.S. Government to assert its moral leadership in the promotion of human rights and the development of international law by ratifying the Genocide Convention, which has been ratified by 75 other nations;

Urge the United States Senate in the 93rd Congress to advise and consent promptly to ratification of the Convention on the Prevention and Punishment of the Crime of Genocide;

Suggests to the participating Lutheran Church bodies that they encourage their congregations and members to study materials for this purpose, and that they stimulate the exercise of citizenship by their members in communicating insights arising from such study to senators and to other appropriate government officials.

The Lutheran Council in the U.S.A. again urges the Senate to act swiftly to advise and consent to the ratification of the Genocide Treaty, with the appropriate understandings and declaration, before the end of the current session of Congress.

SEPTEMBER 18, 1984.

DEAR SENATOR: We, the undersigned representatives of national religious and civic organizations, are deeply encouraged by President Reagan's endorsement of the Genocide Convention, and we urge your support for ratification.

The Genocide Convention was the very first human rights treaty enacted by the United Nations. Largely a result of American initiative, it was adopted in December, 1948 as a worldwide response to the Nazi Holocaust and as a mechanism to prevent its recurrence. At present, the Genocide Convention has been ratified by

ninety-three nations, representing three-quarters of the world's population and virtually every democracy and Great Power, with the exception of the United States.

Although the treaty was transmitted to the Senate on June 16, 1949 by President Harry S. Truman, it has yet to be ratified. Sadly, it is today one of the longest-standing proposals ever before the U.S. Senate. Our failure to ratify has brought us nothing but embarrassment around the world, and has impaired America's role as a champion of human rights. That is why ratification is a major and continuing priority for our organizations.

As an expression of international morality, the Genocide Convention shows that humanity will never again tolerate crimes against religious, ethnic or racial groups.

We hope you will support ratification and speedy action on this important treaty before Congress adjourns for the year.

Sincerely,

Warren W. Eisenberg, Director, International Council, B'nai B'rith International; Nancy Sylvester, IHM, National Coordinator, NETWORK, A Catholic Social Justice Agency; James Hamilton, Associate General Secretary, National Council of Churches; Edward F. Snyder, Executive Secretary, Friends Committee on National Legislation; Henry Siegman, National Executive Director, American Jewish Congress; Dr. David Gordis, Executive Vice President, American Jewish Committee; Edward R. Killackey, Director, Maryknoll Washington Office of Justice and Peace; Craig Biddle III, National Director, IMPACT, Inc.; Robert W. Tiller, Director, Governmental Relations, American Baptist Churches, USA; Robert Z. Alpern, Director, Washington Office, Unitarian Universal Association of Churches in North America; Delton Franz, Director, Washington Office, Mennonite Central Committee (U.S. Peace Section); Joseph R. Hacala, S.J., Jesuit Social Ministries; Dr. William L. Weiler, Washington Office of the Episcopal Church; James H. Matlack, Director, Washington Office, American Friends Service Committee; Leland Wilson, Director, Washington Office, Church of Brethren; Gretchen Eick, Associate for Policy Advocacy, Office of Church and Society, United Church of Christ; Rabbi David Saperstein, Director, Union of American Hebrew Congregations, Religious Action Center; George Chauncey, Director, Presbyterian Church (U.S.A.); Mary Jane Patterson, Director, Presbyterian Church (U.S.A.)

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento.

Hon. CHARLES PERCY,
Committee on Foreign Relations, Washington, DC.

DEAR MR. CHAIRMAN: I respectfully urge this committee and the United States Senate to act without further delay to ratify the Convention on the Prevention and Punishment of the Crime of Genocide.

The atrocities committed against the Armenian people during World War I by Ottoman Turks, against the Jewish people by the Nazis during World War II and against the Cambodian people in the 1970's must never be forgotten, ignored or repeated.

Ninety-six nations have ratified this treaty since it was adopted by the United Nations General Assembly on December 9, 1948. It is incomprehensible that the nation which above all others stands for the rule of law, respect for human life and the dignity of the individual has not ratified it.

My parents came to this country because America provided the hope that they could live, work and raise their family in a community free from violence and lawlessness. Our country is far from perfect in this regard. Yet every day we are strengthening our commitment to public safety, and we are succeeding in getting more criminals off our streets. Surely, it also behooves us to take a stand against criminal nations who would commit wholesale murder and robbery against an entire people.

It would be most fitting for the United States Senate to ratify the Convention in 1984 which marks the 25th anniversary of the death of the treaty's principal author, Raphael Lemkin.

Lemkin, a Polish jew, first took interest in the issue of the deliberate destruction of a people following the extermination of 1.5 million Armenians in Ottoman Turkey during World War I. Less than three decades later, Lemkin lost 49 of his

own family members in the Nazi Holocust, From that point on until his life ended in 1959, this courageous man worked tirelessl;y to make genocide an international crime.

We must dedicate ourselves to the ideal for which Raphael Lemkin persevered: the right of all people of the world to live and work and raise their children in peace and freedom. Ratification of the Genocide Convention will be a strong message of commitment by our freedom-loving nation to preserve basic human rights and to prevent a recurrence of this heinous crime against humanity.

Most cordially,

GEORGE DEUKMEJIAN.

SEPTEMBER 1984.

From American Embassy; Nassau.
To Secretary of State; Wash; DC.
Subject: Ratification of Genocide Convention.

Hon. CHARLES H. PERCY,
U.S. SENATE; WASHINGTON, DC.

DEAR SENATOR: I was personnally elated with the President's announcement of the administrations support for the long overdue ratification of the Genocide Convention. Your announcement of hearings on this subject at the end of this month also is a source of great delight to me. They would be most timely and helpful to bring this vital matter to its successful culmination.

Mr. Chairman, I should like to be given the opportunity to at least submit a written statement in favor of ratification. There aren't too many of us about now, but it was my privilege to participate in the very first hearings on the issue at the beginning of the 50's, and two others since. In fact, I was honored to work closely with Dr. Raphael Lemkin, who literally sacrificed his life for the convention. The statement would be concise and pointed.

With all best wishes and warmest regards,

Sincerely,

LEV E. DOBRIANSKY,
U.S. Ambassador to the Bahamas.

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